Petition

No. 81-1007

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LEKTRO-VEND CORP., a Delaware corporation, ANN STONER, as Administrator of the Estate of HARRY B. STONER, Deceased, and STONER INVESTMENTS, INC., a Delaware corporation,

Petitioners,

v.

THE VENDO COMPANY, a Missouri corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BARNABAS F. SEARS
69 West Washington Street
Chicago, Illinois 60602
(312) 269-0300

JAMES E. S. BAKER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7400

ATTORNEYS FOR PETITIONERS

OF COUNSEL:

THOMAS L. BREJCHA, JR.
Boodell, Sears, Sugrue,
Giambalvo & Crowley
69 West Washington Street, Suite 500
Chicago, Illinois 60602

JAMES A. HARDGROVE
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

(1) Whether a merger between substantial competitors within the same increasingly concentrated market, whose combined market share exceeds 30%, may nevertheless be upheld under § 7 of the Clayton Act, merely upon a showing that (a) the acquired firm, though still a "major factor," "leading supplier," and feared competitor, lost market share and personnel and faced a "risk of loss" before the merger, and (b) that the combined firm, although dominating the market in the ensuing decade, also lost some market share thereafter.

(2) Whether the "Rule of Reason" under § 1 of the Sherman Act sanctions the exaction of world-wide covenants not to compete in connection with a dominant firm's unlawful acquisition of a "leading" competitor and the employment of such competitor's president.

(3) Whether covenants not to compete which are overbroad upon their face, whose principal purpose included the elimination of substantial competitors, and which were actually enforced against such competitors by the dominant firm in a concentrated market, may yet be upheld under § 1 of the Sherman Act for lack of additional "adverse market impact."

(4) Whether such covenants, otherwise unlawful under § 1 of the Sherman Act, may be re-drawn by a federal court to render them lawful.

(5) Whether in a treble damage proceeding under the Sherman Act, full faith and credit prohibits a federal court from considering evidence that a competitor engaged in "sham" litigation.

STATUTES INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18, provides in pertinent part as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * * *

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part as follows:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> * * * *

The Judicial Code, 28 U.S.C. § 1738, provides as follows:

> * * * *
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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RECORD REFERENCES IN THE BRIEF

Tr.—Record References to the transcript of the Trial June 8 to June 30, 1978.

R.—Record references to the five volume transcript of the hearing on the Motion for a Preliminary Injunction in February, 1975.

PX and *DX*—1) State Court Exhibits and Testimony: Exhibits admitted in the two state court trials are referred to by their exhibit number ("PX " or "DX "). In these exhibits, "P" designates Vendo and "D" designates Stoner and Stoner Investments, their positions in the state court litigation. They are to be found in two books of exhibits which were admitted at the preliminary injunction hearing as:

PX 301 (Vol. I, comprising PX 1A-PX 79 and DX 1-DX 33)

PX 302 (Vol. II, comprising PX 101-PX 135 and DX 201-DX 304).

Other material from the state court proceedings, which is not reproduced in the hearing transcript, is cited to the two volumes of the state court abstract, which were admitted as:

PX 303 (first state trial, pp. 1-625) and

PX 304 (second state trial, pp. 267-1225).

2) Exhibits at 1975 Preliminary Injunction Trial: Petitioners' exhibits received in evidence at that trial are cited as PX 301 through PX 367, and respondent's are DX 401 through DX 423.

3) Exhibits at 1978 Trial before Judge Roszkowski: Petitioners' exhibits are designated as PX 1001, *et seq.*, and PX 2001 *et seq.* Respondent's exhibits are designated as DX [illegible]01 *et seq.*

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LEKTRO-VEND CORP., a Delaware corporation,
ANN STONER, as Administrator of the
Estate of HARRY B. STONER, Deceased, and
STONER INVESTMENTS, INC., a Delaware corporation,
Petitioners,

v.

THE VENDO COMPANY, a Missouri corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on August 27, 1981, affirming a judgment in favor of respondent, upon trial of petitioners' claim under the Sherman Act, 15 U.S.C. §1, and Clayton Act, 15 U.S.C. §18.

OPINIONS BELOW

The opinion of the Court of Appeals is unofficially reported at 1981-2 Trade Cases ¶64,258 and is reproduced in the Appendix, p. 1. The Findings of Fact and Conclusions of Law of the District Court are reported at 500 F.Supp. 332, and are reproduced in the Appendix, p. 42.

JURISDICTION

The final judgment of the Court of Appeals was entered on August 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

NOTE: Emphasis supplied throughout.

STATEMENT OF THE CASE

This is a federal antitrust treble damage action, brought in the Northern District of Illinois, under §§4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). Petitioners charged, *inter alia*, that respondent, The Vendo Company ("Vendo"), violated §1 of the Sherman Act (15 U.S.C. §1) by its exaction of world-wide covenants not to compete and its employment of Harry B. Stoner ("Stoner") in June, 1959, in connection with Vendo's acquisition of the assets of Stoner Manufacturing Corp. ("Stoner Mfg."). Petitioners also contended that said acquisition itself was illegal under §7 of the Clayton Act (15 U.S.C. §18) and thus afforded no legitimate business justification for the imposition of the restraints upon competition.

The case came before this Court once previously (*Vendo v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); App. 175), upon an interlocutory appeal from the grant of a preliminary injunction against respondent's attempts to collect certain judgments rendered against Stoner and Stoner Investments, Inc. in the Illinois courts. The injunction was reversed upon jurisdictional grounds, by a plurality of three Justices, two Justices concurring, and four Justices dissenting (see *infra*, p. 9). The case is now before the Court after trial below.

Vendo's Acquisition of Stoner Mfg. and Employment of Harry Stoner. Even before acquiring Stoner Mfg., Vendo was the world's "greatest producer of vending machines." It sold in every state and in 58 countries in five continents. It intended to expand wherever coins were used, and sought a "complete line" of vending products. By 1956, Vendo's product line included venders for beverages, ice cream and "a whole variety of food equipment" including cookies and peanuts ("similar to a candy machine"), soup, coffee, sandwiches and salads. Also planned were hot canned food, cigarette and candy venders. In 1957, Vendo defended its acquisition of another bottle vender producer before the F.T.C. on the

basis that all vending machines compete within the same broad "relevant market." Vendo's share of the relevant market (coin-operated food, beverage and cigarette venders) was 21.6%, 22.9%, 30% and 24.3% in 1955-1958 (PX 1078).

Stoner Mfg. sold candy, pastry & snack, coffee, hot canned food, hot sandwich, and cigarette machines; a cold drink vender, and others, were in development. In 1957 F.T.C. testimony, Vendo said Stoner was also an industry "leader"; its documents classified Stoner as a "competitor."

Stoner Mfg.'s sales of *candy venders* fell from the 1955 high of 71% to 31% by 1959, but still led all others. Its share of the relevant market was 7.2% in 1955; 6.9% in 1956; 5.6% in 1957; and 4.4% in 1958 (PX 1078).

Combined in 1959, Vendo and Stoner Mfg. shared 35.6% of the relevant market (*Id.*).

In acquiring Stoner Mfg., Vendo had two aims: expansion of its product line and elimination of Stoner's competition. Vendo had planned Stoner-type products since 1955. By 1958 it noted: "Stoner and others may have a head start on us which may be difficult to overcome later, plus tougher competition" (PX 1061). Vendo's Sales VP reported a "consensus" favoring the acquisition as *Vendo's expansion "would be definitely retard[ed] with a competitor such as Stoner already in the field"* and would prove "very unprofitable" if Stoner Mfg. were "to fall into the hands of a more aggressive competitor" (PX 319). Wagstaff pushed negotiations as other competitors were "actively negotiating" with Stoner and "showing active and substantial interest." Vendo's Stevens, upon detailed analysis found *Stoner Mfg. was still a "leading supplier"* and "a major factor," whose recent sales lag matched Vendo's. (PX 312). Other Vendo officials and memoranda also lauded the record and prospects of Stoner Mfg. before the acquisition (*infra*, p. 15-16).

Vendo sought and obtained F.T.C. clearance for the acquisition, but withheld the foregoing internal memoranda. Contrary to said memoranda and to its own earlier representations before the F.T.C., Vendo urged that it did not compete with Stoner Mfg.; emphasized their dissimilar products; and omitted any mention of its "definite decision" and efforts to develop Stoner-type products, or Stoner Mfg.'s continued strength in the market. (PX 313 vs. PX 1057-58, 1048, 1044-47).

Vendo exacted elaborate non-compete covenants, requiring that Stoner Mfg. (renamed "Stoner Investments") not compete for ten years "in the United States or any foreign country in which Vendo . . . is so engaged." The covenant in Stoner's employment contract also applied, not to where Stoner Mfg. did business, but "in any of the territories in which [Vendo] or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities." (quoted below, App. 5-6). The covenant ran for 5 years after expiration, or upon termination, of Stoner's 5 year employment.

Vendo officials testified that Stoner "wasn't to compete anywhere, in the whole world"; that he "wasn't to compete, ever," whether employed or not (Tr. 247-48, 266); and that Vendo "certainly wanted to be sure in making this acquisition that [Stoner] would be on our side of the fence and not a competitor" (Tr. 327). While "it would not matter whether Mr. Stoner actually rendered a service or not" (PX 1011), Vendo told Stoner that he would be president of Vendo's Stoner Division. Stoner "consistently said" that he "wanted to participate in the whole concept" (Tr. 288), but immediately following the closing, Vendo directed that Stoner have no line responsibility; moved engineering and research to Kansas City; dropped development work, without consulting Stoner; and instructed technical personnel to ignore him.

Stoner—a conceded "design genius" (PX 28)—was thus relegated, in Vendo's words, to the role of "senior citi-

zen". "father confessor" and "advisor." He was never assigned to Vendo's products planning committee, nor called upon for any exercise of his "genius." Vendo acknowledged that it was paying Stoner for his "obligation not to compete" (Tr. 115). This was "[o]ne of the main justifications for" Stoner's employment (Tr. 256), indeed "the essence of it" (McGreevy dep., pp. 4, 7).

The Development of Lektro-Vend. In 1960, Stoner began giving financial aid for development work by former Stoner employees which culminated in the first in/first out vending machine ("FIFO"), called "the Lektro-Vend machine."

In December, 1962, invited to join in production and sale of the Lektro-Vend, Stoner sought a release from Vendo, but was refused because, according to Vendo, a "major advantage" of the 1959 agreement was that it "guaranteed" that Vendo would "never" have to compete with Stoner (PX 28). Vendo had been aware of, and "outrage[d]" by, Stoner's aid to Lektro-Vend at least as early as October, 1962. Yet Vendo never terminated Stoner, despite its right to do so under the contract (PX 1B), thus allowing Stoner's non-compete covenant to continue in effect for its full ten year term.

After refusing to release Stoner, Vendo asked Stoner to see if it would purchase the Lektro-Vend design. Vendo's engineers then found flaws in the machine and concluded that it "could not be sold competitively." Stoner, hearing nothing further, wrote Vendo that "the future will show that this represents a serious mistake on your part." Later, in May, 1963, Vendo's Chairman Pierson inspected the machine, and said, "if one can be perfected, why, at a reasonable price, I think it will do fine business" (Tr. 183-87). Pierson confirmed that Vendo did not purchase the Lektro-Vend because it could not be sold competitively.

Vendo's Enforcement Of Its Anticompetitive Restraints. In June, 1964, Stoner's "employment" ended. In March,

1965, Stoner announced his affiliation with Lektro-Vend to the trade to offset rumors of its foundering. Deciding that Stoner had now gone "to[o] far," Vendo filed suit against Stoner and Stoner Investments in Kane County, Illinois in August, 1965, charging a breach of the non-competition covenants and seeking to bar Stoner "particularly from participating in the operations of Lektro-Vend." Vendo had feared that "Lektro-Vend could be a very formidable competitor" (Tr. 327). Vendo later added a charge that its trade secret had been misappropriated for Lektro-Vend. Vendo's alleged trade secret was its 1959 candy machine models, which Vendo itself had found deficient. Stoner's alleged piracy was said to have occurred at a Vendo meeting he had attended for only a few minutes.

After the first state court trial, judgments for $1,350,000 were entered for breach of the covenants and theft of the trade secret. On appeal, the Illinois Appellate Court reversed the judgments, holding that Vendo never had a trade secret, let alone that Stoner stole one. It said that Vendo's trade secret claim "cannot seriously be contended." (245 N.E. 2d at 271, 273).*

Upon remand, contrary to Vendo's own staff memorandum on the subject (DX 227), and the prior testimony of its officers (Tr. 128-29, 378, see DX 11, 13),

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* Vendo had filed a similar suit on a covenant in 1957, against another former employee working for a competitor in Georgia, which it lost. Vendo wrote to local counsel that the employee "has moderated many of his annoying activities considerably, so this [suit] has at least accomplished something". Local counsel advised against appealing, but Vendo suggested adding a trade secret claim although such relief "would seem to be of very little practical value". Vendo "decided that it would be to the Company's advantage for many reasons to keep this case pending for a while" and took an appeal in order "to delay the final resolution". Vendo pressed for "further delay" and its general counsel concluded: "If this action hampered [defendant's] activities somewhat as a practical matter, and the Sales Department says that it has, I assume that it has been worthwhile." (PX 344-50, 1233).

Vendo contrived a new theory: that Stoner breached his contract by not advising Vendo to develop its own FIFO machine. Though Vendo's own documents detailed that Vendo rejected FIFO because it thought the required selling price would be too high (DX 227), the trial court entered judgments against defendants for $7,345,500 based on Vendo's new theory.

Upon the second appeal, the $7,345,500 judgment was reversed because *inter alia* "[n]either the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO" and because its new theory was outside Vendo's pleadings and the Court's mandate (300 N.E. 2d at 634).

Upon appeal to the Illinois Supreme Court, the trial court's judgments were reinstated. Here Vendo prevailed upon another new theory: that Stoner had diverted Vendo's corporate opportunity to acquire the Lektro-Vend machine. The damage award of $7,345,500 was based on what Vendo would have earned had it owned the Lektro-Vend machine. (321 N.E. 2d at 9-10)

Developments In The Vending Machine Market. Already the largest producer before its Stoner Mfg. acquisition, commanding an average 24.7% market share from 1955-58, Vendo's share from 1959 through 1972 averaged 30% (PX 1077-78). During the "Fabulous Sixties," when the market itself doubled in sales, Vendo sales "nearly tripled" (PX 109). Through the Stoner acquisition Vendo achieved a "full line" without pursuing the "costly and hazardous . . . route of developing [its] own equipment" (DX 3378). "Full line" vending afforded a definite competitive edge through the Sixties. Thus, the acquisition "add[ed] immeasurably to the over-all strength of [Vendo] in its announced policy of being a leader in the automatic merchandising field" (DX 3378).

The "Fabulous Sixties" also witnessed increasing concentration, from 130 firms in 1957, to 76 in 1963, to only

66 in 1974, only 49 of which sold more than $100,000—a trend continuing into the 1970's. By 1968, Vendo was "in much the same position as General Motors or U.S. Steel in their . . . markets, in that a small number of firms share the greatest percentage of the market"; it was "a price leader" and, as such, had to consider "both its own needs and . . . the common need of its competitors", to "[e]ncourage a stable price structure" and "[a]void competition on a price basis." (PX 1131-2, 2016, p. 3).

It was also during the 1960's that Vendo pursued and publicized its litigation against Stoner which was a focus of trade concern over "what might happen." As the acquisition eliminated Stoner Mfg., Vendo's lawsuit devastated Lektro-Vend Corp. Despite its concededly "revolutionary" FIFO machine (Vendo's lack of which allegedly cost it more than $7 million in profits), Lektro-Vend reported a substantial net loss from 1965-77.

Prior Proceedings Below And Before This Court. After the Illinois Supreme Court decision, petitioners obtained a preliminary injunction in the instant action in June, 1975, barring Vendo from collecting its judgment, upon findings by the late District Judge Richard W. McLaren, after a five-day trial, that petitioners were likely to succeed upon their antitrust claims and that Vendo's collection threatened to violate the antitrust laws and impair federal jurisdiction to pass on petitioners' claims (App. 238).*

* The court also found that Vendo's "covenants extracted were overly broad" and "their object (and effect) were primarily directed at the elimination of competition rather than protection of good will" (App. 245); that Stoner's "covenant amounted to a naked covenant . . . , solely anticompetitive in purpose and effect" (App. 246); that there was "substantial evidence" of anticompetitive intent" (App. 248) and "persuasive evidence" that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately" (App.

(Footnote continued on following page)

On appeal, the Court of Appeals affirmed the injunction (App. 221) but, on writ of certiorari, this Court reversed (App. 175) a plurality of three Justices holding such relief barred by the Anti-Injunction Act, 28 U.S.C. §2283, two Justices concurring, and four Justices dissenting in an opinion by Mr. Justice Stevens who noted that the injunction had been "entered by a District Judge whose understanding of the federal antitrust laws was unique" (App. 199 n. 1, 2). This Court remanded for trial, the plurality saying that, despite the unavailability of injunctive relief, a federal antitrust plaintiff retained "his ability to sue for treble damages resulting from the vexatious prosecution of . . . state-court litigation" (App. 188 n. 6).

Upon remand from this Court, the case was tried below in June, 1978, before Judge Stanley Roszkowski. As before Judge McLaren, the trial record (except for damages issues), largely comprised documentary evidence, including exhibits, depositions, and abstracts of testimony at the two state court trials, most of it coming from Vendo officials. Nevertheless, in its decision, the trial court rejected petitioners' claims (App. 42). On August 27, 1981, the Court of Appeals affirmed (App. 1).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and with decisions of other Courts of Appeals, with respect to the applicable standards for assessing the legality of mergers between substantial competitors within the same market under § 7 of the Clayton Act, and the legality of noncompetition covenants exacted in connection with such mergers under § 1 of the Sherman Act. Under an erroneous concept of full faith and credit,

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* *continued*

249); and that "plaintiffs have placed considerable evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo" (App. 252).

the decision below also unduly curtails the jurisdiction of federal courts in treble damage cases to consider, as evidence of anticompetitive intent, the manner in which a litigant has prosecuted a prior state court action, including the assertion of false claims therein.

In rejecting petitioners' claim that Vendo's 1959 acquisition of Stoner Mfg. offended § 7 of the Clayton Act, the decision below effects a wholly unwarranted expansion of the rule laid down in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Whereas *General Dynamics* carved a narrow exception to the rule of "presumptive illegality" for mergers between substantial competitors in markets characterized by increasing concentration, established by this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the decision below enlarges the exception so far as to engulf the rule. Thus it sanctioned a merger between two "leaders" in an already concentrated market, which produced a combined firm controlling no less than 35.6% of that market, solely on the basis that Stoner Mfg. had suffered a "deteriorating market position," without the slightest evidence that the company was inherently weak or that its decline could not have been "cured" absent its absorption by the dominant competitor in the same market. The Court also brushed aside—or ignored—other indisputable evidence that Vendo recognized, before the merger, that Stoner Mfg. was far from unhealthy but rather a "major factor" and "leading supplier" within the market—indeed, a firm whose future competition Vendo feared—and that its "decline" was illusory.

Furthermore, the decision below also erred in giving controlling weight to certain post-merger evidence that Vendo, still dominant for at least a decade, declined thereafter, and when other evidence showed that substantial anticompetitive effects *did* materialize during the period of Vendo's dominance.

The Court of Appeals' decision upholding the noncompetition covenants entirely misconceived and mis-

applied the controlling tests under § 1 of the Sherman Act, enunciated in *United States v. Addyston Pipe & Steel*, 85 Fed. 271, 282 (6th Cir. 1898) (per Taft, J.), *aff'd as modified*, 175 U.S. 211 (1899), and recently reaffirmed by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The decision below imposed an additional test of "adverse market impact," and ignored the anticompetitive impact occurring whenever a restraint, which fails the tests of "ancillarity," is exacted and enforced to exclude substantial competitors from a market, as here. The Court also held that overbroad covenants may be re-drawn by the Court and brushed aside repeated, explicit admissions from Vendo that its aims *included* the elimination of Stoner and Stoner Mfg. as competitors.

Finally, the Court below erred in refusing even to consider prosecution of sham litigation for anticompetitive purposes, including its assertion of two false claims in the Illinois courts.

I.

IN UPHOLDING VENDO'S ACQUISITION OF STONER MFG. UNDER §7 OF THE CLAYTON ACT SOLELY BY REASON OF STONER'S PRE-MERGER DECLINE AND VENDO'S OWN DECLINE MORE THAN A DECADE LATER, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Section 7 of the Clayton Act proscribes acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" in any relevant market (15 U.S.C. §18). It is designed to arrest restraints of trade *in their incipiency*, before they may develop into actual restraints. *Federal Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). Therefore only a reasonable probability that an adverse effect will occur need be shown. (*Id.*). Under *U.S. v. Addyston Pipe & Steel*, 85 Fed. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), before any covenant not to compete

may be upheld under §1 of the Sherman Act as an "ancillary" restraint, the underlying main transaction, which the covenant purports to protect, must itself be valid.* Here, the "main transaction," Vendo's acquisition of Stoner Mfg. was clearly invalid under §7.

In *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that under §7 no broader inquiry as to the structure, history and probable future of the market is required when market share statistics (deemed in *Brown Shoe Co., Inc. v. U.S.*, 370 U.S. 294, 322 n. 38 (1962) as "the primary index of market power") are themselves sufficient to make out a *prima facie* case of illegality. Thus a merger between competitors, resulting in a combined market share of 30% or more, and adding significantly to market concentration, was held "*so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*" (374 U.S. at 364-5). Pursuant to this rule, the Court thereafter struck down mergers which resulted in combined market shares of 29.1% (*U.S. Aluminum Corp. of America*, 377 U.S. 271 (1964), 25% (*U.S. v. Continental Can Co.*, 378 U.S. 441 (1964), 7.5% (*U.S. v. Von's Grocery Co.*, 384 U.S. 270 (1966)), and even 4.49% (*U.S. v. Pabst Brewing Co.*, 384 U.S. 546 (1966)). And notably, in *Seeburg Corp. v. F.T.C.*, 425 F.2d 124, 129 (6th Cir. 1970), the Sixth Circuit similarly held unlawful a merger between two vending machine manufacturers, whose respective pre-merger shares were 13.8% and 5.1% of the vending machine market, and 9.5% and 15.6% of the bottle vender sub-market, noting *inter alia* the "trend toward economic concentration in . . . the overall vending machine manufacturing field, where *in 1963 five firms did 67.1 per cent of the business*" (*Id.*).

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* See Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust Section 211, 218 (1959).

Underlying such decisions is the rationale that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (*U.S. v. Aluminum Corp. of America, supra*, 377 U.S. at 279).

Here Vendo and Stoner Mfg. were competitors in the manufacture and sale of vending machines, whose market shares were 24.3% and 4.4%, respectively, in 1958, the year prior to the merger. Their combined market share in 1959, when the merger occurred, rose to 35.6%. Further, the market was already trending toward concentration—a trend that continued thereafter. Thus petitioners invoked the rule of presumptive illegality under *Philadelphia National Bank* and other decisions, *supra*, there being no "evidence clearly showing that the merger is not likely to have . . . anticompetitive effects" (*Id.*, 374 U.S. at 364-65). Indeed, Vendo did not even contend that Stoner Mfg. was no longer a viable competitor, let alone invoke the "failing company" defense.* On the contrary, its own pre-merger memoranda attested to the continued strength of Stoner Mfg. as a competitive factor in the market. In fact, Vendo feared that, absent the merger, Stoner Mfg. would "definitely retard" Vendo's own planned expansion (*supra*, p. 3).

The Court below, however, upheld the rejection of petitioners' §7 claim, invoking the exception to the "presumptive illegality" rule applied in *United States v. General Dynamics, Inc.*, 415 U.S. 486 (1974). The Court held that petitioners' market share evidence was not a reliable indicator of probable anticompetitive effects because,

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* The "failing company" defense to a §7 action requires proof that a party to the merger faced a grave probability of business failure and that no merger with any alternative purchaser was available which would afford fewer anticompetitive effects. *See, e.g., U.S. v. General Dynamics Corp.*, 415 U.S. 486, 506-07 (1974).

as in *General Dynamics*, other "undisputed evidence" showed that "Stoner Manufacturing's market position in the late fifties was anything but healthy," and was "deteriorating . . . prior to the acquisition," as reflected by the drop in Stoner's share of *candy vender* sales—but one phase of its business—from 71% in 1955 *to 31%* in 1959, and Stoner's own affidavit, submitted by Vendo in seeking pre-merger clearance from the F.T.C., which referred to his own poor health, loss of a key executive, and the company's present "risk of loss" (App. 39).

Further, the Court cited findings that "Vendo's competitive position had declined significantly after the merger," specifically that its share of candy vender sales dropped from 31% to 16% by 1969; that later it withdrew from cigarette and candy vender production; and that its market share "plummeted" to 24% in 1973 (App. 39-40).

But these findings, even assuming their correctness, do not bring this case within gunshot of *General Dynamics*. On the contrary, were such findings held sufficient to justify the merger of leading competitors in concentrated markets, then the *General Dynamics* exception to the settled rule of presumptive illegality would engulf the rule itself.

Thus merely upon a showing of some lost sales in one segment of the acquired firm's business (indeed, to a 31% share!), or loss of one key executive, or illness of another, or perception of a "risk of loss" for the business, a dominant competitor could acquire another "leading supplier" and "major factor" within the same concentrated market, thereby increasing concentration therein, eliminating a feared competitor, increasing its own market share from 24.3% to 35.6%, all with utter impunity under §7.

None of these findings even remotely reflected any substantial weakness inherent in Stoner Mfg., or negated that company's future ability to compete effectively.

And all businesses must contend routinely with "risk of loss," with changes in key personnel, with fluctuations in sales, demand, production, expenses and income.

Indeed, while the decision below brushes aside petitioners' "reliance on a few statements by Vendo officers to the effect that Stoner Manufacturing was still viable prior to 1959 and was not about to collapse" (App. 39), the record contains exhaustive, detailed analyses of Stoner Mfg. on the part of Vendo officials, attesting not merely to its viability but to its inherent strengths, and even comparing that company favorably with Vendo itself. For example, Vendo's Stevens analyzed Stoner Mfg. sales data in October, 1958, shortly before final negotiations, and wrote: that *both* Stoner's and Vendo's 1957 sales declined 11%; their 1958 sales "were down approximately the same;" Stoner's products showed "stability in performance;" its candy vender sales "remained relatively constant" in 1955-57; a recent increase in competitors' sales was temporary, and Stoner's competitive position would be corrected in the near future; Stoner's coffee machine showed "real stability" from 1955-57; Stoner was still "the leading supplier of candy and pastry machines . . . also a major factor in instant coffee equipment;" its "greatest strength is . . . machines [with] outstanding mechanical performance;" its weakness, a lack of customer services, but even so, customers "can't afford to [go elsewhere] strictly because of Stoner's ability to produce good machinery" (PX312).

Vendo's chief executive, Wagstaff, reported in February, 1959, that "Stoner really believes in the ability of his company to continue on as it has in the past;" that *Stoner's "sales did not slip as badly as ours;"* that recent low earnings were "understandable" in light of nonrecurring expense items, Stoner's concern for the quality of his operation, and his lack of concern "whether he earned [less] this particular year;" that Stoner's "people [were] all convinced that the company can earn $400,000

or upwards this year," January sales already suggesting "substantial earnings" for the year (DX1, pp. 1-3).

Vendo's marketing chief recommended that the acquisition proceed because *inter alia* Vendo's own expansion "would be definitely retard[ed] with a competitor such as Stoner already in the field" (PX319).* As for Stoner, Wagstaff also reported in February, 1959, that his health had improved considerably since his return from the Mayo Clinic and that Stoner "wanted to participate" (DX1).

Moreover, the Court below also ignored key findings in *General Dynamics* which underlay its holding that market share data were unreliable indicators of future ability to compete in that case. There one coal producer acquired another; while market shares reflecting past production and sales were substantial, evidence showed that nearly all coal output was sold under long term requirements contracts. Yet, as the acquired firm's coal reserves were depleted, it could not compete for future long term contracts. Under these circumstances, evidence as to "past ability to produce is of limited significance" as an indicator of future performance; rather, the lack of uncommitted coal reserves demonstrated the acquired firm's "weakness as a competitor" (415 U.S. at 501-04).

Not only was the acquired firm's weakness in *General Dynamics* (i.e., loss of any product to sell) far more fundamental than the problems of Stoner Mfg. cited below but, even more importantly, this Court made additional

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* See also DX3378, another Wagstaff letter of 1/27/59 on the negotiations, reporting *inter alia* that "Stoner's product line is real good and we need it badly"; his "name in the Trade is excellent"; *"there is no reason why it would not be safe to project [sales] indefinitely at"* the level of $6 million, *the five-year average*, despite current sales of $5.6 million, etc.

Vendo's chairman Pierson testified that Vendo "thought [Stoner Mfg.] was *the outstanding company in the industry*" (PX304, p. 928).

specific findings that the acquired firm in *General Dynamics* was unable to restore its depleted reserves, absent the merger under attack. In fact, attempts to locate additional reserves had been unsuccessful (415 U.S. at 509). In sharp contrast, here the Court below made no finding whatsoever, nor did Vendo introduce the slightest evidence, that any problems of Stoner Mfg. —however severe—could not have been remedied absent its absorption by Vendo, its largest competitor.

Nor can the evidence as to Vendo's declining performance *after* the merger, cited by the Court below, suffice to rebut the presumption that anticompetitive effects were likely as of the merger date in 1959. As held in *U.S. v. Falstaff Brewing Corp.*, 383 F.Supp. 1020, 1027 (D.R.I. 1974), cited below (App. 40), post-merger evidence cannot validate an illegal merger but may "confirm trends . . . perceived at the time of the merger" in the market. Certainly, there was no evidence, let alone any finding below, that Vendo was declining in 1959. Moreover, while the Court below found that Vendo's market share averaged 30% between 1959 and 1966, falling to 24% in 1973, Vendo's share continued to average 30% all through 1972 (*supra*, p. 7). Indeed, Vendo prospered throughout the 1960's, enjoying concededly significant competitive advantages resulting from the Stoner Mfg. acquisition (*Id.*), which "add[ed] immeasurably to [Vendo's] over-all strength" and its "announced policy of being a leader" (DX3378). This was also the period in which concentration continued, when Vendo sought to avoid competition in pricing, and when it enforced its covenants and pursued its litigation against Stoner and Stoner Investments, impairing competition from the revolutionary Lektro-Vend FIFO machine (*supra*, pp. 7-8).

II.

IN HOLDING THAT THE COVENANTS DID NOT VIOLATE §1 OF THE SHERMAN ACT, THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.

In *U.S. v. Addyston Pipe & Steel Co.*, *supra*, 85 Fed. at 282, Judge Taft set forth the test for determining the legality of a non-competition covenant under §1 of the Sherman Act. Under that test, such a covenant is lawful only if: (1) the covenant is "merely ancillary" to the main purpose of a lawful contract; and (2) the covenant is no broader than necessary to protect the legitimate property interests of the covenantee. (*Id.* at 282).

Under *Addyston*, before a covenant not to compete which is "merely ancillary" to a lawful sale of a business or a legitimate employment agreement can be upheld, "the court must find that the restraints are reasonably necessary" to protect the *good will purchased* by the acquiring firm or the employer's *trade secrets*. (85 Fed. at 281).

This Court, in *Nat. Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978), reaffirmed this formulation of the Rule of Reason in non-compete cases. There, Justice Stevens, for a unanimous Court, discussed the early covenant case of *Mitchel v. Reynolds*, I.P. Wmns. 181, 24 E.R. 347 (1711):

> "Mitchel involved the enforceability of a promise by the seller of a bakery that he would not compete with the purchaser of his business. *The covenant was for a limited time and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable*, even though it deprived the public of the benefit of potential competition.
>
> The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate trans-

action. . . [citing *Addyston Pipe*]. (435 U.S. 679, 688-89).

The Court below held that, under the Rule of Reason, the covenants, even if overbroad, would not violate the Sherman Act "unless there is a significant adverse 'market impact'." And, in the Court's view, plaintiffs' evidence failed because it showed "mere injury to a competitor," not to competition itself. (App. 26)

The decision below is in direct conflict with the decisions of other Courts of Appeals and also conflicts with principles enunciated by this Court. Under the "Rule of Reason" as applied to covenants not to compete, "if the restraint exceeds the necessity presented by the main purpose of the contract, *it is void* (*U.S. v. Addyston Pipe & Steel Co., supra*). As Justice Stevens wrote in *Nat. Soc. of Professional Engineers, supra*, 435 U.S. at 688, when a covenant imposed in connection with the sale of a business exceeds "the area in which [the selling firm] had operated," its "impact on competitive conditions" (or "market impact") is unreasonable because it covers territory where the seller's good will did not reach. Accordingly, where substantial interstate commerce is involved, as here, a covenant failing the *Addyston Pipe* test must be held void, without more.*

In a covenant not to compete case, unlike a case involving some new, untested restriction, the pernicious, adverse effect on competition is inherent in the restraint itself, and the only question under §1 is whether the res-

* This Court and other federal courts have repeatedly struck down covenants where the restraint was broader than necessary to protect the legitimate interests of the purchaser in the good will acquired or in maintaining the confidentiality of his trade secrets. *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 434 (1908); *Compton v. Metal Products, Inc.*, 453 F.2d 38, 44 (4th Cir. 1971), *United States v. Holophane Co.*, 119 F.Supp. 114, 119 (S.D. Ohio 1954); *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1090 (D. Md. 1969); *United States v. Great Lakes Towing Co.*, 208 Fed. 733, 742-743 (N.D. Ohio 1913).

traint is necessary to protect some legitimate business purpose. If unnecessary or excessive, a covenant's "impact on competitive conditions," in the language of *Professional Engineers*, is unreasonable.*

Indeed, if a covenant is unreasonable in scope or not "merely ancillary" to a main contract, it amounts to nothing less than a market allocation. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust Section 211 (1959). Market allocations are *per se* illegal and their anticompetitive effect is presumed. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

Further, that a restraint may injure but one competitor directly and others only indirectly cannot redeem it, particularly where, as here, the injured parties—Stoner the "design genius," and Lektro-Vend—were potentially major factors in the industry. A market allocation excluding only one competitor is no less illegal.

Finally, the adverse impact on the market here was obvious and devastating. This industry was marked by a dramatic trend toward concentration. Vendo was the largest manufacturer, controlling 30% of the market. It was the dominant force in that market, touting its ability to control the prices at which all vending machines were sold. Such market power alone is sufficient to show a likelihood of an adverse impact. Bork, *Ancillary Restraints and the Sherman Act*, *supra*, at 211.

The restrictive covenants foreclosed the growth of Lektro-Vend and the marketing of its revolutionary vending machine. The acquisition eliminated Stoner as a

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* A closer scrutiny of "market impact" may be required where "a new type of restraint" is involved because courts' experience with that type of restraint is limited and the balance between pernicious and pro-competitive effects is unknown. *See Professional Engineers*, *supra*, 435 U.S. 679, 690-91, *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 9 (1979), which discuss the test to be applied in determining whether *a particular* practice or restraint is unlawful.

competitor, prevented his company from "falling into the hands of" another competitor, and denied the market Vendo's "definite decision" to develop its own FIFO machine.

Also, any requirement of special adverse market impact is at war with decisions finding overbreadth or improper intent alone sufficient to invalidate a non-competition covenant. This Court and other courts have struck down covenants which, on their face, prohibited competition where the acquirer is doing business.* The Court below, however, lent its imprimatur to sweeping world-wide restraints foreclosing competition by the covenantor for ten years. These restraints also were phrased in terms of prohibiting competition anywhere the *purchaser* was operating, indeed, anywhere it intended to expand—not where the seller and its good will extended.

The overbreadth of these covenants is no less egregious than the similar world-wide, *albeit* 25-year, restraints in *Nordenfelt v. Maxim Nordenfelt Guns & Amm. Co.*, A.C. 535, which Justice Stevens cited as an example of a covenant "that could not possibly survive scrutiny under the Sherman Act." *Vendo v. Lektro-Vend Corp.*, 433 U.S. 623, 653 n.21 (1977) (App. 207).

Also, this Court and Courts of Appeals have held that anticompetitive intent alone is sufficient to invalidate a restraint. Such restraints are unreasonable if "surrounding circumstances give rise to the inference or presumption that they were intended to restrain trade and

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* *E.g. Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 434-35 (1908) (covenant prohibited competition within 50 miles of where *acquirer* was doing business); *United States v. Great Lakes Towing Co.*, 208 Fed. 733, 743 (N.D. Ohio 1913) (covenant prohibited competition at all harbors on four Great Lakes and seller's business usually took place at one harbor).

enhance prices." *Professional Engineers, supra*, at 690.* Here, Vendo employees' explicit admissions in documents and in testimony, demonstrated that Vendo's object included the elimination of Stoner's competition. (*Supra*, pp. 3-5) Thus, Vendo's Wagstaff testified as to the purpose of the covenants: "I mean he wasn't to compete anywhere in the world, anywhere . . . he wasn't to compete, ever." Wagstaff admitted that "one of the main justifications" for the employment contract itself was "getting a non-competition covenant". Accordingly, Stoner was given no authority nor "any specific duties, no, sir"; his position was made strictly advisory and Stoner employees were told to ignore him. Stoner's "obligation not to compete" was "what [we] were paying him for."**

Indeed, "one of the major advantages" of the acquisition itself was guaranteeing that Stoner would *never* compete with Vendo. Vendo feared that sales of its own planned candy machine would be "definitely retarded" with "a competitor such as Stoner already in the field."

Also, despite Vendo's non-use of Stoner, Vendo refused to release, or to terminate, Stoner when he sought to quit in 1962, even though Vendo knew of Stoner's finan-

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* *See also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (acknowledging "the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect"); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3rd Cir. 1975) ("an agreement is inimical to Section 1 if it results in an otherwise reasonable restraint of trade but was designed to achieve a forbidden restraint").

** This evidence that Stoner's employment was "sham," cannot be brushed aside on the basis of Stoner's health. Wagstaff's pre-sale report to Vendo stated that Stoner's health had considerably improved after his return from the Mayo clinic (DX1 p.4) and Wagstaff testified that "all through the negotiations" Stoner "consistently said" that he wanted to participate in the whole [management] concept." (Tr. 288) Nor can Vendo's relationship with Stoner be explained as a mere breakdown of communications. Vendo's actions took place immediately following the closing, and Pierson admitted that this was his idea all along (Tr. 91-92).

cial assistance to Lektro-Vend. As Judge McLaren found, the only possible purpose of Vendo's decision was "to limit Mr. Stoner's activities for the full planned term of the post-employment agreement." (App. 246).

The Court below also upheld the covenants on the ground that Vendo sought to enforce them only within "reasonable time, space and product limitations." (App. 22) The Court noted that the development of Lektro-Vend took place in Aurora, Illinois and that it was a candy machine. Thus the actual phrasing of the covenants was "irrelevant." But this effort to re-write the covenants is also at odds with settled antitrust principles enunciated by this Court and with decisions of other Courts of Appeals.

Under *Addyston Pipe*, "if the restraint exceeds the necessity presented by the main purpose of the contract, *it is void.*" (85 Fed. at 282). *See also Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 434 (1908). Thus, if a covenant not to compete is invalid because of overbreadth *or* anticompetitive intent, it is invalid *ab initio*. A court should no more rewrite a covenant not to compete than any other anticompetitive restraint of trade.

Further, by their terms, the covenants imposed single, indivisible restraints. Vendo *insisted* that the covenants be in that form, as Wagstaff acknowledged (Tr. 243-44). Judge McLaren, in issuing the preliminary injunction, held:

> "The general rule that where a contract is only partially illegal under the antitrust laws, the illegal portions can be severed, is therefore inapposite. Here the anticompetitive clauses are essential primary elements of the bargain and thus cannot be severed, making all elements of the 1959 agreements unenforceable. . . The 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart." (App. 247)

Moreover, Vendo's own intent must control. Vendo made no attempt whatsoever to tailor its restraints to

areas in which Stoner Mfg. even arguably might have generated good will before the sale. On the contrary, by their very terms the covenants were designed to protect Vendo's entire business domain—both present and future—without any reference to the territorial scope of Stoner Mfg.'s activities. How could a court substitute its own language for that *drafted and required* by Vendo? As the court stated in *Alders v. AFA Corp. of Florida*, 353 F.Supp. 654, 658 (S.D. Fla. 1973), *aff'd*, 490 F.2d 990:

> "The court, as a general rule, should not rewrite such contracts, since this would encourage employers or purchasers to impose egregious restraints for their *in terrorem* effect, secure in the knowledge that, if challenged, the covenants would be construed by a court to include only the lawful area of restraint".*

Petitioners submit that the decision below raises significant and recurring problems concerning non-competition covenants. While non-competition covenants are commonplace in acquisition and employment agreements, there is a relative paucity of litigation under the Sherman Act involving their legality.

Despite the cases cited above striking down unreasonable covenants under the Sherman Act, and despite the uniform agreement among commentators that non-competition covenants should be scrutinized under the Sherman Act,** the Court below quoted the reservations expressed in *Bradford v. New York Times Co.*, 501 F.2d 51, 59 (2d Cir. 1974) about applying antitrust analysis to

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* *See also* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 681-84 (1960).

** *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 628 n.8 (1960); Goldschmid, *Antitrust's Neglected Stepchild: A Proposal For Dealing With Restrictive Covenants Under Federal Law*, 73 Colum.L.Rev. 1193, 1204 (1973); Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust 211 (1959).

covenant cases, "which traditionally have been addressed by state courts." (App. 25-26).

Petitioners respectfully suggest that it is appropriate to resolve once and for all the standards to be applied in judging the validity of non-competition covenants, including whether invalid covenants may be rewritten and what kind of market impact must be shown to determine whether they are invalid. Such a review is imperative in view of the frequent imposition of covenants and their impact on the nation's economy.

III.

IN REFUSING, ON THE BASIS OF FULL FAITH AND CREDIT, TO CONSIDER EVIDENCE THAT VENDO ENGAGED IN SHAM LITIGATION, THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In this Court's prior review of the preliminary injunction below, the Court did not specifically decide whether a single lawsuit brought in violation of the Sherman Act could fall within the "mere sham" exception to the *Noerr-Pennington* doctrine,* as applied in the adjudicative context in *California Motor Transport v. Trucking Unlimited, Inc.*, 404 U.S. 508, 513 (1972). The plurality (Justices Rehnquist, Stewart and Powell) stated that while injunctive relief was unavailable, an antitrust plaintiff could recover treble damages "resulting from the vexatious prosecution of that [single] state-court litigation." (App. 188, n.6) The dissent (Justices Stevens, Brennan, White and Marshall) would have rejected the argument that harassing anticompetitive litigation was immune if confined within only one state court lawsuit or if such lawsuit proved successful. (App. 214-16).

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* Based upon *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Thus, the majority of this Court (the plurality and dissenting justices in this case) have indicated that a single state court suit, prosecuted in an effort to foreclose competition, can violate the Sherman Act. Significantly, this very case was remanded for hearing on the merits of the claim that the state court litigation violated the antitrust laws.

The Court below, while agreeing that a federal court could consider an antitrust claim where state court litigation resulted in the enforcement of an unlawful contract, refused to consider petitioners' claim that Vendo's manner of prosecuting its Illinois action evidenced its anticompetitive intent. The Court said that it lacked jurisdiction to consider such evidence, citing the full faith and credit statute.* (App. 35).

We respectfully submit that the decision below on this point is at odds with the Court's decision on the preliminary injunction, as well as other decisions of

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* The Court of Appeals' reliance on the full faith and credit statute (28 U.S.C. §1738) was clearly in error. Obviously, full faith and credit does not, and cannot, prevail where the federal issue is paramount, as it is here. Apart from federal primacy, full faith and credit merely gives national effect to the doctrine of *res judicata* in the federal courts. *Riley v. New York Trust Company*, 315 U.S. 343, 349 (1942); *Williams v. Murdock*, 330 F.2d 745, 751 (3d Cir. 1964); 1B *Moore's Federal Practice*, ¶10.406 at 902 (2d Ed. 1974).

There can be no *res judicata* here because the issues in this case and those in the state court were entirely different. There is lacking here the required identity of parties and this suit is based on an entirely different cause of action from that litigated in the state court. *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 362-363 (6th Cir. 1967).

Since the cause of action here is not the same, the state court judgment cannot preclude plaintiffs' antitrust claim in the present proceeding. In fact, even if the Illinois courts had considered and rejected a federal antitrust defense, it would have no effect upon this case. The treble-damage claim in the federal court would not be precluded. *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 830, 832 (9th Cir. 1963); *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir. 1955), *cert. denied sub nom. Walsh v. Lyons*, 350 U.S. 825 (1955).

this Court and Courts of Appeals. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-25 (10th Cir. 1952).

Petitioners demonstrated below that Vendo deliberately and falsely charged Stoner with theft of a trade secret and with responsibility for Vendo's own decision not to have FIFO (both of which claims the Illinois Appellate Court found to be false); tried, in Vendo's words, "to keep Stoner's feet against the fire on the [appeal] bond requirements;" prevented removal of the state action to federal court so that both parties' claims could be tried together in the only forum having jurisdiction to pass on petitioners' federal antitrust treble damage claims; and engaged in other harassing suits (*e.g.*, *supra*, p. 6 fn.).

Here petitioners never sought collateral federal review of any issue passed upon by the Illinois Supreme Court. On the contrary, petitioners urged that Vendo made charges which *it knew to be false*, as the evidence below (including substantial evidence which was not before the Illinois courts) conclusively demonstrated, and that Vendo's *purpose* was anticompetitive. Obviously, such evidence is deserving of full consideration by federal courts whose exclusive jurisdiction in treble damage suits is untrammeled. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1955), *cert. denied*, 350 U.S. 825 (1955).

The decision below thus poses significant and recurring questions concerning both the contours of full faith and credit and the extent to which anticompetitive litigation is protected by the *Noerr-Pennington* doctrine. The precedential effect of the three opinions in this case on this very issue has been variously interpreted. Compare, for example, *Cyborg Systems, Inc. v. Management Science America, Inc.*, 1978-1 Trade Cases, ¶61,927 (N.D. Ill.) with *Platt Saco-Lowell Ltd. v. Spindelfabrik Suessen-Schurr*, 1978-1 Trade Cases ¶61,898 (N.D. Ill.)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BARNABAS F. SEARS
69 West Washington Street
Chicago, Illinois 60602
(312) 269-0300

JAMES E. S. BAKER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7400

ATTORNEYS FOR PETITIONERS

OF COUNSEL:

THOMAS L. BREJCHA, JR.
Boodell, Sears, Sugrue,
Giambalvo & Crowley
69 West Washington Street, Suite 500
Chicago, Illinois 60602

JAMES A. HARDGROVE
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Appendix

No. 81-1007

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FILED
NOV 25 1981
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LEKTRO-VEND CORP., a Delaware corporation,
ANN STONER, as Administrator of the
Estate of HARRY B. STONER, Deceased, and
STONER INVESTMENTS, INC., a Delaware corporation,

Petitioners,

v.

THE VENDO COMPANY, a Missouri corporation,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BARNABAS F. SEARS
69 West Washington Street
Chicago, Illinois 60602
(312) 269-0300

JAMES E. S. BAKER
One First National Plaza
Chicago, Illinois 60603
(312) 853-7400

ATTORNEYS FOR PETITIONERS

OF COUNSEL:

THOMAS L. BREJCHA, JR.
Boodell, Sears, Sugrue,
Giambalvo & Crowley
69 West Washington Street, Suite 500
Chicago, Illinois 60602

JAMES A. HARDGROVE
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

No.

In The

Supreme Court of the United States

October Term, 1981

LEKTRO-VEND CORP., a Delaware corporation,
ANN STONER, as Administrator of the
Estate of HARRY B. STONER, Deceased, and
STONER INVESTMENTS, INC., a Delaware corporation,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2120

LEKTRO-VEND CORPORATION, a Delaware corporation, ANN STONER, As Administrator of the Estate of HARRY B. STONER, Deceased, and STONER INVESTMENTS, INC., a Delaware corporation,

Plaintiffs-Appellants,

v.

THE VENDO COMPANY, a Missouri corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65 C 1755—Stanley J. Roszkowski, *Judge.*

ARGUED FEBRUARY 10, 1981—DECIDED AUGUST 27, 1981

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,* and WOOD, *Circuit Judge*.

PELL, *Circuit Judge*. This appeal represents the culmination of nearly sixteen years of litigation over complex antitrust issues at all levels of the Illinois and federal court systems. In this most recent appeal, the plaintiffs contest the district court's findings that a certain acquisition by the defendant company in 1959, and the concomitant execution of covenants not to compete,

* Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

did not violate §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 7 of the Clayton Act, 15 U.S.C. § 18.

The Parties

The plaintiffs in this case are Lektro-Vend Corporation (Lektro-Vend) and Stoner Investments, Inc. (Stoner Investments), both Delaware corporations, and Ann Stoner, Administrator of the estate of Harry B. Stoner.[1] Harry Stoner (Stoner), an innovative design genius in the vending machine manufacturing industry, was president and controlling owner of Stoner Manufacturing Corporation (Stoner Manufacturing) prior to its 1959 sale to the Vendo Company (Vendo). Stoner Manufacturing primarily manufactured and marketed candy vending machines. The defendant, Vendo, is a Missouri corporation which manufactures and markets various types of vending machines. After the 1959 sale, Stoner held the office of president of Vendo's Aurora, Illinois Division until June 1, 1964. He also served as a Vendo director from May 28, 1959 to April 21, 1964.

Plaintiff Lektro-Vend was developed with Harry Stoner's assistance beginning in 1961 to manufacture candy and snack pastry vending machines. It was formally incorporated in September, 1963. Plaintiff Stoner Investments, successor to Stoner Manufacturing, is a real estate and investment company which owns almost 80% of Lektro-Vend's stock. Stoner Investments was wholly owned by Harry and Ann Stoner prior to Harry Stoner's death.

Vendo's 1959 Acquisition of Stoner Manufacturing

Vendo primarily manufactured beverage and ice cream vending machines prior to 1959. By that time, Vendo was a leading vending machine manufacturer and was considering expanding its product line to in-

[1] Harry B. Stoner, who initiated this lawsuit in 1965, died on March 28, 1976. His wife, Ann Stoner, as personal representative, was substituted as party plaintiff.

clude several types of machines it did not then manufacture including a candy machine. Stoner Manufacturing had previously approached Vendo in 1955 to suggest that Vendo acquire Stoner Manufacturing, but those negotiations had proved fruitless. In October 1958, prompted by Harry Stoner's failing health and the death of Stoner Manufacturing's executive vice-president, Clarence Adelberg, Stoner Manufacturing again initiated negotiations with Vendo. In an affidavit submitted to the Federal Trade Commission to gain premerger clearance, Stoner explained his reasons for selling the business:

> The stock of the Corporation is owned by four members of our family. There are 870 shares outstanding, of which I own 245 and my wife owns 155.
>
> . . .
>
> My own health has never been robust. . . . Nevertheless, I had always felt able to, and had, managed the business without difficulty until the death of Clarence R. Adelberg. . . . Since his death there has been a void in management which has not yet been filled.
>
> . . .
>
> . . . I am concerned because the principal asset of each of the stockholders is his Stoner Mfg. Corp. stock. I feel that the strain of my responsibility is too great in the present state of my health.
>
> . . .
>
> Vendo seemed to be a logical purchaser because no other prospective purchaser had any management people capable of running the business without being educated in the vending machine field. Vendo being experienced in that field will be able to take over with less assistance from me.
>
> I am interested in having the business continued, by people who have capable management and who will continue to employ and be compatible with our present officers and employees and with a

> minimum of dislocation of business practices and employment security. I do not want to let the business just drift and carry on of its own momentum because this cannot continue indefinitely and there is great risk of loss involved in such a program. . . .

The district court found that Vendo acquired Stoner Manufacturing to expand its line of vending machines.[2] Robert Wagstaff, Vendo's chief negotiator in the acquisition, testified at trial that:

> [W]e wanted to acquire its candy machine and add it to our line. We liked the capabilities that Stoner Manufacturing represented in connection with some other plans, although it mainly was a desire on our part to enlarge the line of equipment so that we could take care of this demand for full line vending, which was a very real thing in those days. We thought that was the main—that was the main reason for our acquiring to [sic] Stoner.
>
> We thought Harry Stoner would be an asset to our board of directors. He had a fine reputation in the industry, and we thought the name on his equipment was helpful.

On April 3, 1959, Vendo and Stoner Manufacturing entered into a sales contract. Vendo purchased Stoner Manufacturing's assets, including inventions, patents, drawings, designs, and research and development work, in exchange for $3,400,000 in cash and 60,000 shares of Vendo stock.[3] The acquisition agreement contained a

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[2] The plaintiffs argue that Vendo's purpose was not limited to a desire to expand its product line, but also included the intent to eliminate Stoner as a competitor. This contention will be discussed separately hereinafter.

[3] The assets purchased excluded the land and property comprising the Stoner Manufacturing plant which were, instead, the subjects of a lease and option to purchase which Vendo exercised in 1961. Vendo was to pay Stoner (1) all profits in excess of $250,000 realized from the use of the assets purchased annually for a period of ten years or until Vendo exercised its

(Footnote continued on following page)

covenant prohibiting Stoner Manufacturing from any affiliation with

> any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10) years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company.
>
> . . . [and that Stoner Manufacturing will]
>
> co-operate with Vendo to prevent the use by others of the names "Stoner" and "Stoner Manufacturing Corp." in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of, directly or indirectly any formulae or process now owned or used by the Company.

An employment contract was executed on June 1, 1959, which provided that Stoner would serve as an officer or function in whatever other executive or advisory capacity Vendo requested, subject to his health limitations, for five years at an annual salary of $50,000. Stoner stipulated that he would also become a director of Vendo for no additional compensation. The employment contract included the following clause:

> During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the

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[3] *continued*
option to buy the plant, and (2) for a period of ten years, 25% of the income derived from foreign production of the acquired machines. This last provision was subsequently modified by a 1962 compromise agreement between the parties which is not relevant to the issues in this case.

> territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, . . . [but this does not prevent Stoner from working for Vendo or trading in the investment securities market].

The contract provided that Stoner would regulate his own working hours "it being understood that the value of Stoner's services . . . are not measured by the amount of time or effort devoted to the business by Stoner but by the value of his advice and counsel in the operation of the Aurora, Illinois, facility, and his know-how, experience and reputation in the vending machine field."

The time span covered by the noncompetition covenants was identical to the period during which Vendo (1) had the option to purchase the Stoner Manufacturing plant, (2) was to pay a stipulated share of profits from the use of the acquired assets, and (3) was to pay out a specified share of income from foreign production of the acquired machinery.

The Parties' Post-Acquisition Relationship

Rising tensions between Harry Stoner and Vendo officers catalyzed the rapid disintegration of their relationship shortly after the acquisition was consummated. Stoner Manufacturing's engineering, research, and new product research and development departments, as well as executive control of operations, sales, and finance, were moved from Aurora, Illinois to Kansas City, Missouri, Vendo's principal place of business, soon after the acquisition and without consulting Harry Stoner. Thus, no executives in Stoner's division ever reported to Stoner as president of Vendo's

Aurora Division. At a June 24, 1959, meeting, Vendo's then chief executive officer, Robert Wagstaff, advised Stoner that his post as president of the Aurora Division was advisory only. Although Vendo occasionally consulted Stoner regarding business problems,[4] he exercised few actual duties and felt that no one at Vendo heeded his advice. Consequently, Stoner refused to attend any board of directors' meetings during the first year and one-half following the acquisition.

As the district court found, Harry Stoner was particularly disappointed by Vendo's failure to place him on Vendo's Products Planning Committee. Wagstaff, however, testified that Vendo would have assigned Stoner to that Committee "if we could have ever gotten him to take an interest in the operation of the company."

The plaintiffs urge that these circumstances illustrate that Vendo hired Stoner primarily to shelve his genius: "Vendo was thus paying Stoner not to compete rather than employing him for the performance of actual services." Contrarily, as Wagstaff's testimony indicates, Vendo attributed the breakdown of the parties' relationship to Stoner's obstinacy:

> Q: What tasks, if any, did you call upon Mr. Stoner to perform during the five years of his employment contract?
>
> A: Well, very few. We did specifically request he attend directors meetings and take an interest in those meetings, and we asked his opinion on many matters of policy and things of that sort, and actually at the beginning we discussed changes that we desired to make with him in the plant and got his viewpoint, but Harry felt our viewpoint was so contrary to his that it got to the point that the discussions were just completely incompatible, and there was no point to having them. They outraged him and got him upset, and so those things be attri-

[4] The district court documents only four instances in which Vendo sought Stoner's assistance, although Vendo contends that "Stoner's advice was sought on many occasions. . . ."

tion just sort of phase out, but not by policy. I think, thought, and still think that one of the difficulties in anything of that sort is getting people to agree, and I think Harry could have made quite a contribution to the operation if he had not been so irritated at us, which he was.

The Creation and Development of Lektro-Vend

Rod Phillips and his son Bill, former Stoner Manufacturing engineers, resigned from Vendo in mid-1960. They subsequently succeeded in enlisting Stoner's support in their efforts to develop a new type of vending machine. Stoner Investments advanced approximately $200,000 in interest-free loans during 1961 and 1962, and also paid the Phillipses and two other former Stoner Manufacturing/Vendo employees monthly salaries aggregating $1,150. In addition, Stoner allowed them to use a building he owned rent-free. They subsequently designed the revolutionary Lektro-Vend "FIFO" (first in-first out) vending machine that featured stock rotation, a window permitting product display, and the capacity to stock mixed goods on a single conveyor. These features made the Lektro-Vend machine superior to the "drop-shelf" machine manufactured by Stoner Manufacturing at the time of the acquisition.[5] In October 1962, a prototype of the new machine was exhibited at a San Francisco trade show with positive results.

In December of the same year, Stoner's sister-in-law, Ruth Netrey, lent $350,000 to Phillips. This principal amount, later increased to $525,000, was used in part to repay Harry Stoner for his earlier advancements.

During that same month, Harry Stoner sought to be released from his employment contract with Vendo, citing his opportunity to invest in the new Lektro-Vend

[5] Although Vendo had attempted in 1959 to design a machine similar to the subsequently developed Lektro-Vend machine, its designs had proved impractical and Vendo discarded the project.

endeavor as the reason for his request. Stoner apparently did not then reveal his prior financial support for Lektro-Vend. Vendo rejected Stoner's request and instead directed Stoner to inquire whether Phillips would sell the machine to Vendo.

Stoner later reported that Rod Phillips would sell the machine for 1.5 million dollars, the amount which a third company was allegedly willing to pay. In March 1963, Stoner wrote Vendo that:

> Rod Phillips has been inquiring with regards to Vendo's interest in his vending machine. I have advised him that, inasmuch as he had not heard from you, and that I had heard nothing further from you, that I felt that sufficient time had passed so that he could be relinquished of his promise to give Vendo first chance for acquiring it. I think that the future will show that this represents a serious mistake on your part, but, inasmuch as there are other people interested, Rod feels that he is obliged to investigate the depth of their interest in the near future.

Spencer Childers, a Vendo vice-president, replied that Vendo was still interested but would not pay the $1.5 million asking price. Instead, he suggested that Vendo pay all out-of-pocket expenses incurred in developing the machine plus a fair profit margin to the Lektro-Vend creators.

Childers, Stoner, and Phillips met in Aurora on April 30, 1963. During that meeting, Rod Phillips reiterated his request for $1.5 million. On May 17, 1963, Stoner wrote to Vendo chairman Elmer Pierson inquiring whether Pierson wanted him to take any further action, but Stoner received no response.

Pierson testified that Childers had ultimately reported "that he didn't think it would be advisable for our company to go on with the negotiations." When asked if Vendo declined the opportunity to purchase the Lektro-Vend machine because of its price, Pierson testified that "[a]pparently that was what the group decided at that time. . . . Apparently I was told that they came to that conclusion, that it was too high."

In the spring or summer of 1963, Pierson asked Harry Stoner to explain his actual connection with Rod Phillips. Stoner replied that he had lent money to Phillips, but that the loan had been repaid by a third party.[6]

Lektro-Vend was formally organized as a corporation on September, 1, 1963. At about that time, Ruth Netrey's loan was repaid. Lektro-Vend's initial shareholders were Rod and Bill Phillips, a few other employees, and Netrey.

In March, 1964, Stoner Investments executed a contract to sell to Lektro-Vend a new plant it had completed building the previous year. Lektro-Vend financed the purchase with a bank loan secured by Stoner Investments' promise to repurchase the property in the event of default.

Stoner's position as Vendo director expired on April 1, 1964. His employment contract, which ended on June 1, 1964, was not renewed. Subsequently, on June 10, 1964, Lektro-Vend issued 5,000 shares of stock to Ann Stoner, and issued another 5,000 shares to Stoner Investments on July 15, 1964.

The following March, Stoner sent a letter endorsing Lektro-Vend to fifty vending machine operators which stated, in part, that:

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[6] The district court's finding that "Stoner disclosed to Vendo that he had been loaning money to the Phillips, [sic] which loans had been paid back by Stoner's sister-in-law" might seem to imply that, at that time, Stoner revealed to Vendo the identity of the source of funds responsible for the repayment of his loan. But see the Illinois Supreme Court's finding that "Stoner did not disclose that this other person was his sister-in-law. This conversation marked the first occasion on which Stoner disclosed any involvement with Lektro-Vend, and the disclosure was far from complete." *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 300, 321 N.E.2d 1, 7 (1974), *cert. denied*, 420 U.S. 975 (1975). The district court noted that "[i]t appears, however, that Vendo had heard rumors of Stoner's involvement with Lektro-Vend as early as the 1962 trade show."

> As you may know, my association with Stoner Mfg. Co. was terminated last year after 32 years as its President. I am now interested in the new LEKTRO-VEND CORP. . . .
>
> . . .
>
> . . . I am willing to risk my reputation as a vending machine designer and manufacturer to say that the LEKTRO-VEND products will set new highs in earnings to operators and will be the standard of comparison for the next 50 years.

The purpose of the letter was to allay rumors that Lektro-Vend hovered near the brink of financial collapse. Stoner sent a copy of the letter to Vendo's Elmer Pierson because Stoner believed that Lektro-Vend's recent set-backs were "primarily due to the tale of woe and gloom that your [Vendo's] salesmen have spread, right up to making flat statements that they have seen documentary proof that this company has filed bankruptcy." Pierson transmitted the letter to Vendo's general counsel, Glenn Carbaugh, noting that Stoner had gone "to[o] far."

Previous Litigation

Vendo filed a complaint in state court against Harry Stoner and Stoner Investments on August 10, 1965, alleging breach of noncompetition covenants and theft of trade secrets relating to the development of the Lektro-Vend machine. In their answer, Stoner and Stoner Investments claimed that the state court suit violated federal antitrust laws.[7] On December 16, 1966, after a bench trial, the state court found Harry Stoner liable for $250,000 in damages, and adjudged Stoner and Stoner Investments to be jointly liable for an additional $1,100,000. The court enjoined the defendants from further acts of competition.

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[7] On October 21, 1965, the plaintiffs herein filed the instant suit against Vendo which laid dormant, pending resolution of the state court claims, until 1975.

On appeal, the Illinois Appellate Court, in *Vendo Co. v. Stoner*, 105 Ill.App.2d 261, 245 N.E.2d 263 (1969), ruled that Vendo had not proven theft of trade secrets, but that the covenants not to compete were enforceable and had been breached by the defendants, 105 Ill. App.2d 261, 288. The court determined that the trial court had incorrectly stricken the affirmative defense of violation of the federal antitrust laws, and remanded the case for a correct determination of damages and further proceedings. *Id.* at 291, 295-99.

Stoner and Stoner Investments, defendants in the state lawsuit, withdrew the antitrust defense on remand. The trial court this time entered a judgment against the defendants jointly for $7,345,500 plus costs, and against Harry Stoner individually for $170,835 plus costs. The Illinois Appellate Court again overturned the trial court's judgment and remanded for an assessment of damages in accordance with the appellate court's original opinion. 13 Ill. App.3d 291, 300 N.E.2d 632 (1973). This time the remand never materialized because, on appeal, the Illinois Supreme Court reversed the appellate court and affirmed the trial court's judgment on a theory neither advanced by Vendo nor relied upon by the trial court, *i.e.*, breach of fiduciary duty, 58 Ill.2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

At this point the drama shifted to the federal courts. The plaintiffs in the present case (the state court defendants) sought a preliminary injunction to prevent Vendo from collecting the state court judgment pending resolution of the federal antitrust claims. On June 27, 1975, Judge McLaren granted the plaintiffs' motion finding that § 16 of the Clayton Act, 15 U.S.C. § 26, which provides for preliminary injunctive relief, was an expressly authorized exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and alternatively, that the injunction was necessary in aid of the federal court's jurisdiction, a separate exception to § 2283. 403 F. Supp. 527, 536-37 (N.D. Ill. 1975). The Seventh Circuit affirmed on the first ground. 545 F.2d 1050 (7th Cir. 1976). In a divided opinion, the United States Supreme Court reversed, rul-

ing that the injunction was not authorized on either of the grounds relied upon by the trial court. 433 U.S. 623 (1977).

In June 1978, a bench trial on the merits of the federal antitrust claims finally commenced and continued for twenty-three days. The district court found in favor of the plaintiffs on collateral estoppel, *in pari delicto*, and statute of limitations issues, but ultimately rejected all of the antitrust claims.

In light of the gravity of the issues and the substantial commitment of the time and resources of all parties in this protracted litigation, we examine each of the appellants' claims in some detail. We will not review all of the findings of facts and conclusions of law at this juncture, however, but will discuss them separately hereinafter as they relate to each antitrust violation alleged.

Standard of Review

Pursuant to Fed. R. Civ. P. 52(a), this court is bound to uphold the district court's findings of fact unless clearly erroneous and cannot weigh complex antitrust evidence *de novo*. *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 479 (7th Cir. 1980) (per curiam). Conclusions of law and mixed fact/law questions, of course, are subject to a broader scope of review. *United States v. General Motors Corp.*, 384 U.S. 127, 141-42 n.16 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

The plaintiffs urge that the particular circumstances of this case require the application of a broader standard of review to the district court's findings of fact than that ordinarily granted under Rule 52(a). Where the evidence presented to a trial court is essentially documentary with few live witnesses, it is urged that appellate review may be broadened beyond the traditional application of Rule 52(a). Augmented review may arguably be appropriate in a "paper case" because a major rationale behind Rule 52(a)—the factfinder's op-

portunity to determine the credibility of witnesses—is not implicated.[8]

In the recent case of *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 979 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 892 (1981), this court acknowledged that "a broader rule" might be appropriate in a "paper case," but noted that even though "evidentiary documentation [was] voluminous, we see no need in these circumstances to go behind the findings of the trial judge" because nine live witnesses had testified at trial, and the trial judge had questioned the credibility of some of the witnesses. Similarly, we cannot agree with the plaintiffs that the case at bar was a "paper case." Eleven live witnesses testified at the trial. Judge Roszkowski's findings were influenced by some credibility determinations. The court, for example, rejected the testimony of the plaintiffs' expert regarding Vendo's dominance and market power in the industry.[9]

The plaintiffs also complain that many portions of the district court's opinion found their source in the defen-

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[8] The cases in this circuit, as in others, are not in total harmony on what standard of review is appropriate in a "paper case." Although some cases purport to abandon the clearly erroneous standard where the evidence is essentially documentary, *see, e.g., John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir. 1973); *Deep Welding, Inc. v. Sciaky Brothers, Inc.*, 417 F.2d 1227, 1229 (7th Cir. 1969), most of the cases which have discussed the issue have simply utilized a somewhat less exacting application of the clearly erroneous standard. *See, e.g., Oscar Gruss & Son v. First State Bank of Eldorado*, 582 F.2d 424, 431 (7th Cir. 1978); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *Mercantile National Bank of Chicago v. Howmet Corp.*, 524 F.2d 1031, 1034 n.3 (7th Cir. 1975).

[9] The district court found, in part, that "Mr. Kamien did not know the market shares of other vending machine manufacturers and admitted having made no effort to determine them. . . . Not only are his opinions as to Vendo's dominance and monopoly power based on inadequate knowledge of the industry, but they are also based on theories that have no support in the antitrust laws."

dant's post-trial brief or proposed findings of fact and conclusions of law. This circuit does not forbid a district court's partial or entire adoption of one party's findings of facts or conclusions of law. Rather, the use of this procedure is left to the discretion of the district court. *Scheller-Globe Corp. v. Milsco Manufacturing Co.*, 636 F.2d 177, 178 (7th Cir. 1980); *Norfolk & Western Railway Co. v. B.I. Holser & Co.*, 629 F.2d 486, 489 (7th Cir. 1980); *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 979-80 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 892 (1981); *Reese v. Elkhart Welding & Boiler Works, Inc.*, 447 F.2d 517, 520 (7th Cir. 1971). We realize that the adoption procedure is not flawless since such findings "do not reflect the original products of a disinterested mind." *Norfolk*, 629 F.2d at 489; *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977). Nonetheless this practice can be useful as an aid to the trial judge in complicated cases, *Scheller-Globe*, 636 F.2d at 178; *Reese*, 447 F.2d at 520, and "as a practical matter in these times a busy trial judge may in some circumstances be properly assisted with some of the paper work resulting from his own determination of the issues." *City of Mishawaka*, 616 F.2d at 980.

In this case, moreover, the adopted portions did not constitute the entire opinion. The district court rejected the defendant's affirmative defenses of collateral estoppel, *in pari delicto*, and statute of limitations. Furthermore, the district court's opinion spanned seventy-five pages, much of which did not represent the work of Vendo. While contending that the last thirty-five pages of the opinion were substantially adopted from Vendo's proposals, the plaintiffs conceded in oral argument that "there's a reasonable amount of Roszkowski in the first half of the opinion."

Having critically reviewed the record within the bounds of the clearly erroneous standard of review, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 731 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), we conclude that the district court's findings of fact relevant to the issues on appeal are not clearly erroneous. Moreover, as to those issues now properly before this court, we find

that the district judge did not abuse his discretion in adopting the defendant's proposed findings and conclusions. In this case, as in *Scheller-Globe*, 636 F.2d at 178, "[w]e are satisfied that the district court did decide each of the issues and *thereafter* did adopt the findings and conclusions consistent with the determination that the court had made."

The Relevance of the Prior Preliminary Injunction Hearing

The plaintiffs rely heavily upon Judge McLaren's 1975 determination that a preliminary injunction should issue because the plaintiffs were likely to succeed on the merits of their antitrust claims. Judge McLaren himself, however, realized that "[t]he findings contained herein are interlocutory in nature necessarily based on an incomplete record. Of course, a complete trial specifically directed to the issues in this case might produce evidence requiring a different or more limited result." 403 F. Supp. at 357 n.5.

The decision granting the preliminary injunction resulted from a five day hearing at which eighty-nine exhibits and the testimony of four live witnesses were admitted. By contrast, Judge Roszkowski ruled on the merits after concluding a twenty-three day trial which included the testimony of eleven live witnesses and 2,762 exhibits. This contrast in the amount of evidence considered by the district judge in each instance graphically demonstrates the reason underlying the rule that preliminary injunction determinations do not bind a court in the subsequent trial on the merits. This rule is so well-settled in this circuit, *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294, 298-99 (7th Cir.), *cert. denied*, 342 U.S. 819 (1951), and in the other circuits as to discourage most modern-day litigation of this issue. *See, e.g., Oburn v. Shapp*, 521 F.2d 142, 149 n.18 (3d Cir. 1975); *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 199 (9th Cir. 1953); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (3d Cir. 1953); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (8th Cir. 1948). The purpose of a

preliminary injunction is not to conclude the merits of the controversy, but merely to preserve the status quo until a more considered decision on the merits is possible.[10]

The District Court Correctly Found No Violations of the Federal Antitrust Laws

I. THE SECTION 1 SHERMAN ACT CLAIM

It is by now an elementary principle of antitrust law that § 1, which literally prohibits "[e]very contract, . . . in restraint of trade or commerce among the several States, or with foreign nations . . ." does not in fact ban every contract in restraint of trade because "read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that established the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively." *National Society of Professional*

[10] In like manner, the plaintiffs seek to rely upon purported "findings" of the Supreme Court. They emphasize that "the Supreme Court, . . . while holding that an injunction could not legally issue, said that nothing in its opinion precluded the plaintiffs' *'ability to sue for treble damages resulting from the vexatious prosecution of that state court litigation.'*" (Emphasis in plaintiffs' brief.) The Supreme Court, however, was not addressing the merits of *this* case in that statement, nor did it make a finding that the state court litigation *in this case* was vexatious. Rather, the Court's statement was made in the context of its distinction between a federal court's power to enjoin future versus ongoing state proceedings. The Court noted that prior Supreme Court cases recognized that repetitious sham state litigation could constitute an antitrust violation, and in that event, a federal court could enjoin such future state court litigation. But the court declined to read the Anti-Injunction Act so broadly as to allow a federal court to enjoin a pending state lawsuit suspected to be vexatious. The Court noted that "[a]ny 'disadvantage' to which the federal plaintiff is put in the initial proceeding is diminished by his ability to set up the federal antitrust claim as an affirmative defense, . . . and his ability to sue for treble damages resulting from the vexatious prosecution of that state-court litigation." 433 U.S. at 636 n.6.

Engineers v. United States, 435 U.S. 679, 688 (1978). Unless the challenged activity conforms to one of the few categories of restraints adjudged to be *per se* illegal,[11] its legality is properly tested under the rule of reason analysis. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). In particular, the parties agree that the legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason. *National Society of Professional Engineers*, 435 U.S. at 688-89; *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). The plaintiff shoulders the burden of proving the unreasonableness of a restraint unless the challenged activity is *per se* violative of the Act. *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Legitimate reasons exist to uphold noncompetition covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.[12] In the case at bar, Robert

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[11] The *per se* analysis is, in reality, a truncated rule of reason analysis applicable to those restraints "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). *See Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 555 (7th Cir. 1980) (A *per se* exception does not require an analysis of anticompetitive effects, not because "anticompetitive effects need not exist to establish the elements of a *per se* offense, but rather from the fact that the type of conduct complained of in a *per se* action is so destructive of free competition that deleterious effects will be conclusively presumed," such as with group boycotts, market allocation, and certain types of tying arrangements.).

[12] Even at common law,

> [i]t must have been obvious . . . that the flat ban against such restraints of trade covered more than the rationale of the [early common law *per se* rule against covenants not to

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Wagstaff's testimony underscores the recognized necessity for such a covenant: "We certainly felt that we didn't want to buy Stoner Manufacturing Company and then find out that he had set up shop someplace else and had the benefit of his name and equipment and whatnot."

The district court correctly concluded that covenants not to compete are valid if (1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee's legitimate property interests, which require that the covenants be as limited as is reasonable to protect the covenantee's interests. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

The plaintiffs contend that the covenants in this case were not ancillary to a legitimate business transaction, but were executed for the principal purpose of eliminating Stoner as a competitor. They cite Harry Stoner's lack of substantial duties to support their contention that "Vendo was thus paying Stoner not to compete rather than employing him for the performance of actual services." Viewed from another perspective, however, Stoner's paucity of responsibility may have simply reflected Stoner's personal need to avoid employment pressures. His premerger affidavit to the FTC, for example, underscores the severity of his health problems which motivated him to structure a flexible employment relationship. It may well be that Stoner did not minimize the condition of his health to the end of facilitating FTC clearance of a transaction apparently

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compete] required. The rule might prevent desirable transfers of property. The most valuable asset of a business might be the good will of the public toward its owner. Should he wish to sell the business the owner could not get a price reflecting the asset of good will or the true going concern value of his business unless he could promise the purchaser not to return to compete with the business sold.

Bork, *Ancillary Restraints & the Sherman Act*, 15 ABA Section of Antitrust Law Proceedings, 211, 213 (1959) (footnote omitted).

advantageous to him; nevertheless, the words were his and he must bear with all reasonable implications from them.

The district court rejected the plaintiffs' characterization of the main purpose of the covenants as "incredible," and found instead that the covenants were ancillary to contracts executed for lawful sale and acquisition purposes. The court emphasized that it was Stoner who (1) first initiated acquisition negotiations with Vendo, and (2) sought the ten as opposed to five year payout which resulted in the extension of the covenants not to compete from five to ten years.

Because Vendo did pay a substantial price to acquire Stoner Manufacturing, and was paying Stoner a considerable salary for whatever duties he did perform or would have been expected to perform had the parties' relationship not deteriorated so rapidly, Vendo's interests in protecting its (1) acquired goodwill, and (2) any trade secrets or clientele to which Stoner might potentially have access, *see, e.g., Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), were not insubstantial. This is *not* to say, as the plaintiffs suggest, that "the payment of money could somehow justify an anticompetitive covenant." Rather, under the circumstances of this case, the payment of money in the form of the acquisition price and salary is one factor tending to support the district court's finding that the noncompetition covenants were executed to protect Vendo's legitimate interests.

Even if we viewed the plaintiffs' evidence as presenting an arguable inference that the principal purpose behind the transaction was impermissible, we could not upset the district court's finding that the covenants not to compete were instead ancillary to a lawful main transaction in this case. Much of the plaintiffs' purported evidence of unlawful intent consists of isolated excerpts from the testimony of Vendo officers. In light of substantial contrary evidence, we cannot say that the district judge's findings were clearly erroneous

The plaintiffs next argue that the covenants were facially overbroad as drafted and therefore totally void and unenforceable. The noncompetition covenant contained in the acquisition agreement essentially restricted Stoner Manufacturing from directly or indirectly competing with Vendo "in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by" Stoner Manufacturing for a period of ten years. The covenant not to compete ancillary to Stoner's employment contract prohibited Stoner from engaging, directly or indirectly, in the vending machine manufacturing business "in any of the territories in which . . . [Vendo] or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities" for the duration of Stoner's employment with Vendo (which lasted five years) plus five years following the termination of employment.

While we would question the correctness of any finding of facial overbreadth,[13] we do not reach this issue

[13] The plaintiffs primarily complain that the covenants were overbroad because they were tailored to protect the area in which Vendo, not Stoner Manufacturing, operated. We note that both parties operated throughout the United States, and Vendo, at least, operated in many foreign countries. In *Harrison v. Glucose Sugar Refining Co.*, 116 F. 304, 308 (7th Cir. 1902) (upholding the reasonableness of an employment contract prohibiting competition within 1,500 miles of the employer's place of business), this court tested geographical reasonableness in terms of "the area in which the *covenantee* [*i.e.* Vendo] prosecutes his business." (Emphasis added.) *See also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) ("More recently, the limitation that the restraint could not be general or unlimited as to space has been modified in some cases holding that if the protection necessary to the covenantee requires a covenant unrestricted as to space, it will be upheld as valid."). The plaintiffs' attempt to distinguish *Harrison* as an

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because we find support for the district court's position that (1) the actual phrasing of the covenants is irrelevant because a § 1 violation requires proof that the defendant knowingly enforced the arguably overbroad section of the ancillary noncompetition covenant, *see, e.g., Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1083 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), and (2) regardless of arguable overbreadth, most modern courts will uphold a covenant to the extent that a breach of the covenant has occurred within a reasonable geographic area and time period, and, where applicable, with respect to a product reasonably related to the legitimate purpose of the restraint. *See, e.g., Alders v. AFA Corp. of Florida*, 353 F. Supp. 654, 658 (S.D. Fla. 1973), *aff'd without opinion*, 490 F.2d 990 (5th Cir. 1974); Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 674 (1960); Bork, *Ancillary Restraints and the Sherman Act*, 15 ABA Section of Antitrust Law Proceedings 211, 223-24 (1959).

Vendo sought to enforce the covenants in this case only as to clearly reasonable time, space, and product limitations. The district court correctly found that "Stoner's misconduct did not relate to some foreign land or some product far removed from Stoner's prior

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employment case is disingenuous since both employment and acquisition covenants are at issue here.

Moreover, the plaintiffs vigorously argue, in general, that the court should not look to subsequent events (*e.g.*, where and when the covenants were actually enforced) but should instead restrict its inquiry to the language of the covenants *as originally* drafted. They inconsistently argue, however, that Stoner was not subsequently entrusted with any confidential information or duties during his employment and, therefore, the employment covenant was invalid because it protected no valid employment interests. Because we have found that the acquisition transaction was motivated by a legitimate purpose, and that Stoner's employment was not a mere sham as the plaintiffs contend, we could not say that the parties originally drafted the covenant expecting that Stoner would not acquire any confidential information in his employment with Vendo.

operations. On the contrary, the secret development of the Lektro-Vend machine took place right in Aurora, Illinois [the base of Stoner Manufacturing's prior operations and the division in which Stoner was subsequently employed to work for Vendo], and the Lektro-Vend machine was also a candy-vending machine." Moreover, the court emphasized that Stoner's aid in developing the Lektro-Vend machine occurred very shortly after the execution of the 1959 agreements. We agree with Judge Roszkowski that "based on the fact that Stoner became involved with Lektro-Vend within a year or two after selling Stoner Manufacturing, and considering the substantial financial commitment of Vendo in purchasing Stoner Manufacturing, it appears . . . that the restrictive covenants . . . were clearly necessary to protect Vendo's interests in the acquired business and employment of Stoner."

Even apart from alleged overbreadth, however, the district court ultimately ruled that because the plaintiffs did not establish the required § 1 showing of adverse impact upon competition in the relevant market, they failed to prove that the covenants were unreasonable under the rule of reason test. The appellants vigorously contend that no showing of adverse market impact is necessary to establish a § 1 violation in this case because "[i]n a covenant not to compete case, unlike a case involving a new form of vertical restriction, the pernicious, adverse effect on competition flows automatically from the foreclosure of competition by the restraint itself, and the only question is whether the restraint can be justified as necessary to protect a legitimate business purpose." In effect, although the plaintiffs concede that the rule of reason applies in this case, their contention that the adverse effect on competition flows automatically is tantamount to urging a *per se* rule for analyzing noncompetition covenants under § 1. In *Snap-On Tools Corp. v. FTC.*, 321 F.2d 825, 837 (7th Cir. 1963), this court ruled that under the generally more stringent standards of § 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a), "even if this [noncompetition] restriction is unreasonable as to geographic scope, we are not prepared to say that it is a *per se* violation of the antitrust laws."

It is by now well established that any rule of reason analysis requires a showing of anticompetitive market effect. To hold otherwise would ignore the very purpose of the antitrust laws which were enacted for the protection of competition, not competitors. Congress has consistently refused to create a private federal remedy for unfair competition. *Northwest Power Products v. Omark Industries*, 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Section 1 cannot supply private parties with a tool to redress ordinary business torts because § 1 forbids only those restraints damaging to competition. *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 810 (7th Cir.), *cert. denied*, 101 S. Ct. 571 (1980); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980). In his frequently quoted formulation of the rule of reason test, articulated in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis punctuated the Sherman Act's concern for competitive impact:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine the question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

The requirement that plaintiffs prove adverse impact in the relevant market to establish a § 1 rule of reason violation is well established in the Seventh Circuit. *See, e.g., Contractor Utility Sales Co. v. Certain-Teed*

Products Corp., 638 F.2d 1061, 1078 (7th Cir. 1981); *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 810-11 (7th Cir.), *cert. denied*, 101 S. Ct. 571 (1980); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980); *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir.), *cert. denied*, 444 U.S. 916 (1979); *Lee Klinger Volkswagen, Inc. v. Chrysler Corp.*, 583 F.2d 910, 914-15 n.6 (7th Cir.), *cert. denied*, 439 U.S. 1004 (1978); *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).[14]

A showing of adverse market impact has been required in § 1 cases specifically involving noncompetition covenants. *See, e.g., Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1083 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). *Cf. Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 837 (7th Cir. 1963) (action under § 5 of the FTC Act, 15 U.S.C. § 45(a)).

In *Bradford v. New York Times Co.*, 501 F.2d 51, 59 (2d Cir. 1974), the Second Circuit noted that no court applying a rule of reason analysis has ever found an employment noncompetition covenant to violate § 1. Indeed, that circuit has questioned the propriety of applying a § 1 analysis to employment controversies of this type which it regards as individually exerting, at most,

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[14] *Accord, Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 397 (2d Cir. 1980); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980); *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Daniels v. All Steel Equip., Inc.*, 590 F.2d 111, 113 (5th Cir. 1979); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386-89 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *H & B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978); *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 570-71 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 447-48 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).

a very small impact on commerce, and which traditionally have been addressed by state courts. *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Bradford*, 501 F.2d at 60. The court in *Newburger*, however, acknowledged the contrary argument that encourages federal court involvement to curb widespread use of overbroad postemployment restrictions which allegedly causes serious anticompetitive injury to the national economy. *See* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law*, 73 Colum. L. Rev. 1193, 1206-07 (1973).

While we would not refuse to analyze noncompetition covenants under § 1, the Sherman Act does require that the anticompetitive effect of an ancillary restraint be proven.[15] Because the Act is designed to combat adverse effects upon *competition*, however, the plaintiffs must prove more than mere injury to a competitor. *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 810-11 (7th Cir.), *cert. denied*, 101 S. Ct. 571 (1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). Thus, the fact that the covenants in this case were imposed and enforced, thereby hindering the development of a Vendo competitor, Lektro-Vend, is not enough where the development of Lektro-Vend was made possible only through substantial aid from Harry Stoner. Certainly, as the appellants point out, Stoner himself was eliminated as a competitor for a period of time, and the acquisition of Stoner Manufacturing prevented it from being acquired by a possibly more aggressive competitor of Vendo. But this argument proves too much. If this was sufficient evidence of anticompetitive effect, then

[15] The plaintiffs misconceive the nature of the burden of proving adverse market impact under § 1 when they allege that "Vendo [failed to] make even a feeble attempt to explain how competition was not impacted here." It is the plaintiffs' burden to prove the adverse effect on competition. *Cowley v. Braden Industries, Inc.*, 613 F.2d 751, 755 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980).

virtually all noncompetitive covenants executed contemporaneously with a business acquisition or an employment contract would violate § 1 even if reasonably enforced.

We do not agree with the plaintiffs that "[i]f there were no evidence at all of adverse impact here, . . . an adverse impact could never be shown in a § 1 case, much less a covenant-not-to compete case." The facts of *this* case are not compelling, primarily because we agree with the district court that the main purpose of the transaction was legitimate, and the covenants were enforced reasonably with respect to time, geographic scope, and product. Therefore, we cannot find any impact upon competition beyond that which Vendo had a right to restrain in order to protect its legitimate interests.

II. The Section 2 Sherman Act Claim

Section 2 of the Sherman Act proscribes attempted monopolization which has been described as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . ." *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) (jury instruction approved by Supreme Court). The proof requires (1) a specific intent to monopolize, *i.e.*, to gain the power to control prices or to exclude competition in a line of commerce, *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980), (2) predatory or anticompetitive acts engaged in to further the purpose to monopolize, and (3) a dangerous probability of success in the relevant market[18] which requires evidence that the defendant had sufficient market power to have been reasonably able to create a monopoly, *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 297 (7th Cir. 1974); von

[18] Neither party disputes the district court's finding that the relevant market in this case consists of all coin-operated vending machines for the sale of food, beverages, and cigarettes in the United States.

Kalinowski, 2 *Antitrust Laws & Trade Regulation* § 9.01[2] at p. S-7 (1979). *Chillicothe*, 615 F.2d at 430. We agree with the district court that the plaintiffs have failed to establish even one of the three required elements.

A. Dangerous Probability of Success

The district court first rejected the plaintiffs' contention that Vendo possessed sufficient market power to create a dangerous probability of achieving monopoly status. The court noted that while Vendo's sales and profits had increased overall between 1955 and 1966, sales had declined from 61 million to 52 million and profits had dropped from 3.1 million to 1.9 million between 1960 and 1963. These were the initial years of the "fabulous sixties"—a time of increasing industry growth and sales and also part of the time span during which Vendo was allegedly attempting to monopolize the market. Although Vendo's market share from 1959 to 1966 averaged approximately 30% of the relevant market, it dropped from 33% in 1966 to 24% in 1973. By 1974, its operator products market share shrank to 7.4% from a high of 22.5% in 1966. After the acquisition of Stoner Manufacturing, Vendo held about 31% of the candy vending machine market, but by 1969, it maintained a share barely over 16%, and by 1972, Vendo had been wholly eliminated from the candy and cigarette vending machine markets. Between 1966 and 1977, Vendo's net income as a percentage of sales has averaged approximately .7%, down from 7% in 1966, Vendo's most prosperous year ever. Vendo's profits have steadily declined and in each of the four years preceding the trial, Vendo experienced substantial losses which have cumulatively amounted to almost ten million dollars.

Appellants argue that Vendo's post-1966 declining performance is totally irrelevant since the alleged attempt to monopolize occurred with the 1959 acquisition of Stoner Manufacturing and Vendo's initiation of the lawsuit to enforce Stoner's noncompetition covenants in 1965. The plaintiffs, however, cite no authority which would require exclusion of the evidence of the later

period of time. To the contrary, in *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 836, 841 (2d Cir. 1980), although the alleged attempt was facilitated by certain actions occurring by or before 1969, the court relied upon a decline in the company's market share from 54.5% in 1969 to 33% in 1974 to reject the § 2 claim.

It is true, as the appellants proclaim, that the Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense. *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972). A subsequent failure to achieve monopoly status cannot itself vitiate a claim of attempted monopoly—where other evidence substantially supports the attempt—without eviscerating the entire attempt offense. But *Kearney* does not forbid consideration of subsequent market performance to evaluate the existence of the alleged attempt as the plaintiffs contend. As Judge, now Justice, Stevens pointed out in *Kearney & Trecker*, evaluating dangerous probability

> requires an appraisal of the alleged offender's *ability to achieve the forbidden result*, his intent, and the nature of his overt actions. In an antitrust context we must consider *the firm's capacity to commit the offense*, the scope of its objective, and the character of its conduct. The ultimate concern is the firm's actual or threatened impact on competition in the relevant market.

Id. at 598 (footnotes omitted; emphasis added).[17] We agree with the district court that Vendo's market per-

[17] While the court in *Kearney & Trecker* commented that the defendant's 33% market share was "impressive," market share was not the only indicator of market *power* in that case. In *Kearney & Trecker*, the defendant's market power was enhanced by possession of a strategic patent with wide coverage nearly corresponding to the relevant market. *See* Handler & Steuer, *Attempts to Monopolize & No-Fault Monopolization*, 129 U. of Pa. L. Rev. 125, 164-65 (1980).

formance subsequent to the alleged attempts, while by no means dispositive, is at least relevant to Vendo's capacity to monopolize at the time of the supposed attempts.

The district court acknowledged the increased concentration within the relevant market, but found that no dangerous probability of monopolization existed based upon Vendo's 1959-66 30% market share, even apart from its dramatic post-1966 decline. The court noted that the plaintiffs failed to mention even one case in which an attempt to monopolize was based solely upon the market share attributed to Vendo. Nor have the plaintiffs directed our attention to any such case upon appeal. By contrast, numerous courts have found a market share of 30% or higher to be insufficient, by itself, to prove a dangerous probability of monopolization. *See, e.g., Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (54.5% to 33% range); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (50%); *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649, 668 (S.D.N.Y. 1980) (33%); *Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co.*, 1972 Trade Cases ¶73,955 (W.D. Tenn. 1972) at 92,006-007 (30%); *Diamond International Corp. v. Walterhoefer*, 289 F. Supp. 550, 578 (D. Md. 1968) (51%). *See Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). Moreover, plaintiffs' own expert witness testified that market share alone is an insufficient indicator of a company's capacity to control prices and exclude competitors, and that other factors, such as ease of entry into the market, should be considered. Yet, as Judge Roszkowski found, the evidence presented relating to ease of entry contradicted the expert's opinion that Vendo possessed such power. Viewing the evidence of dangerous probability as a whole as we are bound to do, *United States v. Empire Gas Corp.*, 537 F.2d 296, 306-07 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), we cannot say that the district court's finding on dangerous probability was clearly erroneous.

B. Predatory Acts

The plaintiffs argue that Vendo's acquisition of Stoner Manufacturing and other companies, its covenants not to compete with Stoner and others, and its state court litigation to enforce noncompetition covenants in this and other cases, are examples of Vendo's predatory actions designed to seize monopoly power. It is true that acquisitions can sometimes provide evidence of predatory conduct, *see, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966), and "[a]greements not to compete have at times been used for that unlawful purpose." *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948). Such actions alone, however, are not generally considered predatory and are therefore rarely condemned unless they occur within an overall context of unfair monopolistic practices as was true in the cases relied upon by the plaintiffs. *See, e.g., United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States v. Lehigh Valley R.R. Co.*, 254 U.S. 255 (1920); *United States v. Union P.R. Co.*, 226 U.S. 61 (1912); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Eastman Kodak Co.*, 226 F. 62 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1972); *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969). Thus, the Court in *Schine Theatres*, 334 U.S. at 119, noted that "[i]f we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices [conspiracy which, *inter alia*, effectively deprived competing theatres of first- and second-run movies, and threats to open theatres to prevent or destroy competition], . . . the District Court might infer that these agreements were additional weapons in Schine's arsenal . . . ." Similarly, Grinnell's acquisitions in *United States v. Grinnell*, along with discriminatory price manipulation and market allocation agreements, were considered predatory acts where actual monopoly power (87%) existed among the several affiliated defendants.

The district court found that Vendo's actions regarding the acquisition of Stoner Manufacturing and the

execution and enforcement of the noncompetition covenants were motivated by legitimate business purposes, were not predatory, and were "nowhere near sufficient to create such a danger of monopoly . . . [in part] because of Vendo's declining market position, . . ." Judge Roszkowski further emphasized the plaintiffs' failure to prove that any of the actions charged were designed to or did cause injury to major competitors in the vending machine industry such as National Vendors, Automatic Products, or RMI which have obtained significant market shares while Vendo's share declined. In fact, the plaintiffs conceded that Automatic Products was not affected by Vendo's actions.

In their brief on appeal, plaintiffs contest the court's finding that they presented no evidence of actual or potential effect upon competitors. They contend that sufficient impact upon competition was shown by Vendo's acquisitions of other companies, namely Vendorlator (that occurred three years prior to the start of the 1959-65 period which the plaintiffs insist to be the relevant time span), Continental APCO, and Coin Acceptors. We have reviewed the record and find that the circumstances surrounding these transactions provide insufficient proof of the existence of an overall plan to monopolize capable of transforming these otherwise legitimate business activities into predatory acts.[13]

C. Specific Intent

Finally, we agree with the district court that the plaintiffs failed to establish the third prong of the attempted monopolization offense—specific intent. While specific intent to monopolize can sometimes be inferred from predatory acts, the plaintiffs failed to show that Vendo's actions relating to Stoner were not primarily motivated by legitimate business purposes. Nor did they present sufficient evidence to show that Vendo's other

[13] Similarly, proof of Vendo's alleged "policy" of executing and enforcing noncompetition covenants in other employment and acquisition contexts was insufficient to establish that these activities were predatory.

acquisitions, and the execution and enforcement of covenants not to compete in other contexts, were not predominantly motivated by legitimate business purposes, but were anticompetitive in intent or effect. Thus, specific intent cannot be inferred from these acts. *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953); *Chisolm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1145 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974); von Kalinowski, 2 *Antitrust Laws & Trade Regulation* ¶9.01[4], at 9-26 (1979).

Appellants contend that specific intent may be inferred from the potentiality of monopoly power comprising a dangerous probability of monopolization, relying upon *Blair Foods, Inc. v. Ranchers Cotton Oil Co.*, 610 F.2d 665, 669 (9th Cir. 1980), and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). We read these cases as supporting the proposition that market power may be *"one of the circumstances* to be considered in determining whether such intent exists." *Blair*, 610 F.2d at 670 (emphasis added). In the case at bar, however, market share sufficient to establish dangerous probability had not been proven.

Finally, appellants rely upon various statements made by Vendo officials[19] which are scattered throughout the

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[19] The following remarks are illustrative: "Vendo has had restrictive provisions for years in anything it can get them into . . ." "I have always felt that one of the major advantages of the Stoner acquisition contract, from our standpoint, was the fact that it guaranteed that your [Harry Stoner's] design genius would never by coupled with our money to put a new and most formidable competitor into the business against Vendo;" and "Well, I am sure he [Stoner] thoroughly understood that he was not to compete with The Vendo Company. . . . [W]e just didn't want him to compete with us, . . . I mean he wasn't to compete anywhere, in the whole world, anywhere, he wasn't to compete."

The plaintiffs also rely upon the following colloquy:

(Footnote continued on following page)

voluminous record in this case. In the first place, we would not necessarily regard all of the appellants' examples as evidence of specific intent to monopolize. Secondly, while some of the references might arguably support a finding of specific intent if the evidence had established the existence of predatory acts or dangerous probability, we cannot say that the district court's finding of no specific intent was clearly erroneous in light of the plaintiffs' failure to establish these other factors. We agree with the Fifth Circuit's affirmation in *Hayes v. Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (defendant's threats to compete vigorously with, and drive out of business if necessary, a theatre the plaintiff proposed to build), that a "statement of intent to compete, . . . even if perceived as a threat, is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anti-competitive or predatory conduct, is not enough to establish an antitrust violation." (Footnote omitted.) *See Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 285 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973) (Court attaches little significance to statement that the other party "had no right in the walnut shell business. This is my domain."); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971) (Court characterizes remark that the defendant would drive the plaintiff out of business if it chose to compete as "a manifestation of intent to triumph in the competitive market, [which] in the absence of unfair, anticompetitive

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[19] *continued*

> Q: And from the standpoint of Vendo, then, the employment contract was just a means of getting a non-competition covenant. That was its principal purpose, wasn't it?
>
> A: One of the main justifications for it.

But the appellants delete the very next question which amplifies the above response:

> Q: And it was used to put him on the shelf so to speak?
>
> A: Well, I don't think that was ever part of the consideration.

or predatory conduct, is not enough to establish a violation of § 2.").[20]

III. The State Litigation

The plaintiffs separately argue that Vendo's state court suit was not a legitimate use of the adjudicative processes, and that it violated §§ 1 and 2. The main thrust of the argument is that Vendo sought to make the courts parties to enforce restraints forbidden by the Sherman Act. We agree with the plaintiffs that where state court litigation has resulted in the enforcement of contracts violative of the antitrust laws, a state court judgment cannot preclude a federal court from subsequently addressing the merits of the antitrust claims. This is precisely why the plaintiffs received a trial in federal court on their antitrust allegations. In the case at bar, however, no antitrust violation has been proved.

The plaintiffs have appealed the state court judgment to the Illinois Supreme Court which has rendered a final decision, *Vendo Co. v. Stoner*, 58 Ill.2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975). We, of course, are powerless to review the merits of that determination. U.S. Const. art. 4, § 1; 28 U.S.C. § 1738; *Davis v. Davis*, 305 U.S. 32, 40 (1938).

IV. The Section 7 Clayton Act Claim

Even assuming *arguendo* that Vendo's 1959 acquisition of Stoner Manufacturing was a true horizontal

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[20] This case is unlike *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 505 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), in which the court ruled that a jury could infer specific intent to monopolize from expressions of concern by IBM officials about growing competition and the use of "prima facie . . . anticompetitive activities that impaired competition without a legitimate business purpose." In the case at bar, the plaintiffs have failed to prove that Vendo's acts were predatory and not predominantly motivated by legitimate business purposes.

merger,[21] the appellants have failed to establish a § 7 violation. Section 7 prohibits mergers if the effect on any line of commerce "may be substantially to lessen competition, or to tend to create a monopoly." While the statute's choice of the term "may" created a weapon to combat illegal restraints of trade in their incipiency, it also set the standard of proof at a reasonable probability, not mere possibility, of anticompetitive effect. *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967); *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). *See* S. Rep. No. 1777, 81st Cong., 2d Sess. 6 (1950).

The plaintiffs condemn the acquisition solely on the basis of market shares before and after the merger judged within the overall context of the vending machine market's trend towards concentration. In 1958, Vendo's share of the market consisting of food, beverage, and cigarette machines was 24.3%, while Stoner Manufacturing enjoyed a 4.4% share. After the acquisition in 1959, Vendo possessed a combined share of 35.6%. As the court below found, the vending machine industry was becoming increasingly concentrated. In 1957, there were 130 vending machine manufacturers, compared to 76 in 1963, and only 66 in 1964.

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[21] Vendo contends that the companies were not actual competitors prior to the acquisition. The court never explicitly held that the acquisition was most properly analyzed as a horizontal merger because it found that the plaintiffs' § 7 claim failed even if the merger was truly horizontal.

If Stoner Manufacturing and Vendo were not true competitors, the acquisition would more properly be analyzed as a product extension merger to assess the anticompetitive effects of Vendo's entry into the candy vending machine manufacturing market. The plaintiffs do not appeal the district court's rejection of their claim under the more stringent standards applicable to this type of merger as set forth in *United States v. Marine Bancorporation*, 418 U.S. 602 (1974) (geographic market extension). Instead, the plaintiffs merely insist that the merger "must be analyzed as a 'horizontal merger' between competitors."

Based upon these statistics alone, the plaintiffs urge that the acquisition violated § 7. They rely upon the following cases in which similar or smaller combined market shares were condemned in an already concentrated industry, or an industry tending towards concentration: *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (7.5%); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (4.49%); *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (25%); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (29.1%); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) (30%); *Seeburg Corp. v. FTC*, 425 F.2d 124 (6th Cir.), *cert. denied*, 400 U.S. 866 (1970) (18.9% of overall vending machine market and 25% of bottle vending machine submarket). These cases basically indicate that market share is a highly significant factor, and that mergers between strong and viable competitors are likely to be prohibited in an increasingly concentrated market even where the combined market share is very low. *See* von Kalinowski, 3 *Antitrust Laws & Trade Regulation* § 19.02[1], at 19-49 (1979).

In *United States v. General Dynamics Corp.*, 415 U.S. 486, 497 (1974), the Supreme Court adverted to its earlier decision in *Philadelphia National Bank*, 374 U.S. at 363, wherein the Court stated that a merger resulting in a firm with an undue market share which increases the concentration of firms in the market "is so inherently likely to lessen competition substantially that it must be enjoined *in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.*" (Emphasis added.) Thus, a preliminary statistical showing of even small increases in market share or market concentration will generally suffice to establish a prima facie § 7 violation in an industry where concentration is substantially increasing because "[i]n most situations . . . the unstated assumption is that a company that has maintained a certain share of the market in the recent past will be in a position to do so in the immediate future." *General Dynamics*, 415 U.S. at 501. This general presumption, however, does not allow a court to ignore other evidence tending to show that the market shares do not accurately reflect the likelihood

that the merger will substantially affect competition adversely. *General Dynamics* admonished that:

> In *Brown Shoe Co. v. United States* . . . we cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects:
>
> > "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry." 370 U.S., at 321-322.
> >
> > "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.*, at 322 n.38.

415 U.S. at 498.

In *General Dynamics*, the Court found no § 7 violation in part because the acquired company's coal reserves were so low that its potential effectively to compete in the future was weaker than the Government's market share statistics suggested. The Court rejected the Government's contention that the trial court's finding in this respect was equivalent to accepting a "failing company" defense without satisfying the Supreme Court's strict requirements for showing (1) that the acquired business faced a grave possibility of business failure, and (2) that the company had tried, but failed, to merge with a company other than the acquiring firm. 415 U.S. at 506-07. The Court ruled that the defendant's presentation of evidence relating to the acquired company's weakened market position did not relate to the "failing company" defense, but instead "went to the heart of the Government's statistical prima facie case. . . ." *Id.* at 508. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975) (Assuming that the government had established a prima facie violation of § 7, "[i]t was incumbent upon [the defendant] to show

that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition"). Similarly, in *United States v. International Harvester Co.*, 564 F.2d 769, 774 (7th Cir. 1977), this circuit applied the *General Dynamics* rationale and found the statistical proof rebutted by evidence which included a demonstration of the acquired company's weakened financial condition prior to the merger.

In the case at bar, despite the plaintiffs' reliance on a few statements by Vendo officers to the effect that Stoner Manufacturing was still viable prior to 1959 and was not about to collapse, the undisputed evidence shows that Stoner Manufacturing's market position in the late fifties was anything but healthy. Its share of the national candy vending machine market had slid precipitously from 71% in 1955 to only 31% by the time of the acquisition four years later. Harry Stoner's premerger affidavit to the FTC illustrated that he himself believed that Stoner Manufacturing's decline would continue if not sold: "I do not want to let the business just drift and carry on of its own momentum, because this cannot continue indefinitely and there is great risk of loss involved in such a program. I attribute our poor showing in sales for 1958, and since, at least in part to the management difficulties I have already described [*i.e.* Stoner's failing health and the death of a key executive who could not be effectively replaced]."

The district court not only relied upon Stoner Manufacturing's deteriorating market position prior to the acquisition, but also noted that Vendo's competitive position had declined significantly after the merger. Post-acquisition evidence is admissible since the probability of anticompetitive effects is judged at the time of trial. *United States v. General Dynamics*, 415 U.S. 486, 505 (1974). The Court in *General Dynamics* pointed out that the admissibility of post-acquisition evidence generally disfavors defendants because a demonstration of no anticompetitive effects between the time of acquisition and the time of trial is usually accorded limited weight, whereas proof of post-acquisition anticompetitive effect cements the plaintiff's case. This

disparity in treatment follows partially from the fact that merged firms could simply refrain from aggressive or anticompetitive behavior until after the lawsuit was concluded. *Id.* at 504-05. But post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition. *General Dynamics*, 415 U.S. at 506 (changing structure of the industry). *See United States v. International Harvester Co.*, 564 F.2d 769, 777-79 (7th Cir. 1977) (evidence of intensified industrial competition). *Cf. Varney v. Coleman Co.*, 385 F. Supp. 1337, 1345-46 (D. N.H. 1974) (where post-acquisition evidence in a product extension merger showed that the defendant had lost both money and market share, the § 7 claim could not withstand a summary judgment motion); *United States v. Falstaff Brewing Corp.*, 383 F. Supp. 1020, 1027 (D. R.I. 1974) (no § 7 violation where post-acquisition evidence showed that competition remained intense and that the acquired company's profits and market share declined after the geographic extension merger).

The post-acquisition evidence in this case is the type which cannot arguably have been subject to the defendant's deliberate manipulation, nor is it likely that the market was less competitive after the acquisition than it would have been otherwise. Between 1959 and 1969, Vendo's share of the candy vending machine manufacturing market dropped from 31% to 16%, and by 1972, Vendo was completely eliminated from the candy and cigarette vending machine business. As discussed previously, while Vendo's overall market share averaged approximately 30% between 1959 and 1966, it plummeted to 24% in 1973.

Consequently, based upon evidence establishing that (1) Stoner Manufacturing's market position had been steadily deteriorating in the years immediately preceding

the acquisition, and (2) Vendo's post-acquisition shares and profits dramatically declined even as the performance of some of its competitors improved,[22] the district court clearly did not err in rejecting the plaintiffs' section 7 claim.[23]

For the foregoing reasons, the judgment of the district court is

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[22] This result is fortified by our recent decision in *Kaiser Aluminum & Chemical Corp. v. FTC*, No. 79-1886 (7th Cir. July 7, 1981), wherein this court ruled that while unrebutted statistical evidence can alone establish a § 7 violation under *General Dynamics*, nonstatistical evidence undermining the probative value of the statistics can rebut the prima facie case. Slip op. at 29. While the court specifically rejected the argument that financial weakness of the acquired firm can *alone* justify a merger, it did recognize that "the financial weakness of the acquired firm . . . may be a relevant factor in some cases." *Id.*

[23] Because of the disposition of this claim in favor of the defendant, we need not address other alternative arguments advanced by Vendo.

USCA 4969—Midwest Law Printing Co., Inc., Chicago—8-27-81—350

[Filed July 18, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, ANN STONER, as Administrator of the Estate of HARRY B. STONER, Deceased, and STONER INVESTMENTS, INC., a Delaware corporation	)	No. 65 C 1755
Plaintiffs,	)	
vs.	)	
THE VENDO CORPORATION, a Missouri corporation,	)	
Defendant.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This is an anti-trust action filed in 1965 by plaintiffs, Lektro-Vend Corporation ("Lektro-Vend"), Harry B. Stoner ("Stoner"), and Stoner Investments, Inc. ("Stoner Investments") against defendant, the Vendo Company ("Vendo"). Plaintiffs' allege

that defendant's acquisition of Stoner Manufacturing Corporation (the predecessor of Stoner Investments), in 1959, violated sections 1 and 2 of The Sherman Act, 15 U.S.C. §§1, 2 and Sections 4, 7, and 16 of The Clayton Act, 15 U.S.C. §§15, 18, and 26. For the reasons herein stated, this court awards a judgment in favor of defendant.

A bench trial was held in this case beginning in August, 1978 and concluding in September, 1978. The background, findings of fact, conclusions of law, and an analysis and discussion supporting this decision are stated below.

FINDNGS OF FACT[1]

THE PARTIES

Plaintiff, Stoner Investments, Inc. ("Stoner Investments"), is a corporation organized and existing under the laws of

the State of Delaware. It is a successor to an Illinois Corporation of the same name, which prior to June 1, 1959, was named Stoner Manufacturing Company.

Stoner Manufacturing Company ("Stoner Manufacturing") was an Illinois corporation engaged primarily in the manufacturing of candy vending machines.

Plaintiff, Harry B. Stoner ("Stoner"), was president and controlling owner of Stoner Manufacturing, now Stoner Investments, prior to his death in March, 1976. On October 1, 1976, Stoner's wife, Ann Stoner, administrator of his estate, was substituted as a party plaintiff in this case.

Stoner was president of defendant, Vendo Corporation's, Aurora Division (previously Stoner Manufacturing) from June 1, 1959 through June 1, 1964 and a

director of Vendo from May 28, 1959 to April 21, 1964.

Plaintiff, Lektro-Vend Corporation ("Lektro-Vend"), is a Delaware corporation with its principal place of business in Aurora, Illinois. Lektro-Vend was first organized in September, 1963 as a manufacturer of candy and snack pastry vending machines.

Stoner Investments currently owns approximately 78% of the stock of Lektro-Vend.

Defendant, Vendo Corporation, is a Missouri corporation with its principal place of business in Kansas City, Missouri. The principal business of Vendo is the manufacturing and selling of bottle and can soft drink vending machines, including pre-mixed Coca-Cola, to franchised soft drink bottlers. In addition, Vendo manufactures and sells general merchandise

vending machines, coffee vending machines, milk vending machines, ice cream vending machines, hot canned food vending machines, cold food vending machines, and soft drink vending machines to vending operators. At various times, Vendo also manufactured and sold candy, pastry and snack vending machines as well as cigarette vending machines to vending operators.

THE INDUSTRY

The parties agree that Stoner was a design genius in creating innovative vending machine products.

By 1959, Stoner Maufacturing's drop-shelf candy vending machine was the leading candy vending machine throughout the United States. As against other candy vending machine sales, its sales fluctuated between 71% of the market in 1955 and 31% in 1959.

By 1959, Stoner Manufacturing also manufactured and sold vending machines for instant coffee, hot canned food, hot sandwiches, and cigarettes. In addition, Stoner was at work on developing a console cigarette machine, a refrigerated sandwich machine, and a post-mix cold drink machine.

Stoner Manufacturing employed twelve to thirteen salesmen and sold vending machines throughout the United States. In early 1959, the company was also negotiating for the licensing of a company in England to sell its machines abroad, but the negotiations were unsuccessful.

From 1955 to 1959, Stoner Manufacturing's sales varied from a 6.8% share to a 4.2% share of the market of all U.S. vending machine sales. Within the "Vendo-served" market,[2] in that same time period, Stoner Manufacturing's share varied from 7.2% to 4.4.%.

Prior to 1959, Vendo was primarily a manufacturer of beverage and ice cream vending machines. It had approximately 112 company salesmen who sold throughout the United States and it exported its machines to 58 countries.

Vendo's sales and income after taxes for the calendar year ending December 31, 1955 through 1977 are set out in the following table:

Calendar Year Ending December 31	Sales	Net Income (Loss)
1955	$20,799,000	$ 842,000
1956	42,076,000	1,660,000
1957	37,056,000	1,075,000
1958	29,410,000	973,000
1959	45,046,000	2,484,000
1960	61,244,000	3,153,000
1961	53,696,000	2,297,000
1962	55,343,000	2,898,000
1963	51,958,000	1,990,000
1964	63,538,000	3,503,000
1965	77,425,000	5,101,000
1966	90,577,000	6,460,000
1967	88,361,000	5,016,000
1968	99,931,000	4,605,000
1969	99,353,000	2,408,000
1970	90,748,000	2,110,000
1971	91,868,000	92,000

Calendar Year Ending December 31	Sales	Net Income (Loss)
1972	110,794,000	2,573,000
1973	113,346,000	2,857,000
1974	88,374,000	(3,134,000)
1975	69,164,000	(2,463,000)
1976	83,370,000	(857,000)
1977	97,168,000	(3,650,000)

Vendo's share of all vending machine sales was 20.3% in 1955, 21.5% in 1956, 28.2% in 1957, and 28.4% in 1958. Its share of the "Vendo served" market was 21.6% in 1955, 22.9% in 1956, 30% in 1957, and 24.3% in 1958.

Vendo researchers reported that Vendo commanded the following percentages of the markets in which it competed from 1959 through 1969; 35.6% (1959); 34.9% (1960); 26.6% (1961); 29.1% (1962); 26.4% (1963); 28.9% (1964); 32 1% (1965); 33.0% (1966); 31.4% (1967); 32.3% (1968); and 33.0% (1969).

As can be seen, during the time period most immediately relevant to this suite (1959-1966), Vendo controlled approximately 30% of the market in which it competed. In 1966, Vendo expected its share of market dollars to climb to 58% by 1971.

The vending machine industry experienced rapid growth and change in the years 1955 through 1966.

During that period there was a significant trend toward concentration within the industry with one-half the number of manufacturers existing in 1966 as existed in 1958. The 130 manufacturers in 1957 dwindled to 76 in 1963, and 66 in 1964. In 1964, 49 of the 66 manufacturers experienced sales over $100,000.00.

In 1964 only 16 manufacturers of vending machines for confections and food had sales in excess of $100,000; in 1964

only 8 of 12 companies manufacturing vending machines for candy bars had sales in excess of $100,000. This trend toward concentration throughout the vending machine manufacturing industry has continued through 1975. The 66 manufacturers of 1964 had dwindled to 44 by 1975. From 1963 to 1973, the number of manufacturers with sales of $100,000 fell from 54 to 31.

Also during the years 1955 through 1966, the number of locations available for the placement of machines increased and the number of operators in the business increased.

Additionally, development of new equipment was substantial.

The vending machine industry reached its peak in 1966 with sales of $216,518,000.00.

By 1966, the industry was approaching a point of saturation. Industrial con-

struction declined, the number of locations available for the placement of machines decreased, and an increasing percentage of the new machines sold were for replacement of existing machines at existing locations rather than for new locations.

Customers for vending machines can be divided into two different classes: 1) franchised soft drink bottlers (e.g., the Coca-Cola Company), which purchase machines to vend soft drinks which they manufacture, and 2) vending service companies, known as "operators", which purchase vending machines for the sale of food, beverages, and other items typically manufactured by others, including vending machines for hot, cold, and frozen foods, dairy products, coffee, candy, pastry, snacks, ice, soft drinks, and cigarettes.

Bottlers and operators conduct different types of businesses for different purposes.

Franchised soft drink bottlers are in the business of mixing, bottling, and selling, by whatever means, their brand-named soft drink. Bottlers purchase and operate bottle and can vending machines as only one means to sell their drink. Bottlers, in operating soft drink vending machines, are both seeking a profit and a means for creating a preference for their product by making their brand-name soft drink available in as many places as possible whether the location is profitable or unprofitable.

Operators, on the other hand, are companies solely in the business of purchasing vending machines, placing them on locations, loading them with products, and maintaining them in service. Vending operators operate machines solely for a

profit, as they are not interested in establishing the brand name of any product they vend.

There are several types of operators that can be distinguished according to the type of institution served. "Street operators" serve small, public establishments such as gas stations, bowling alleys, bars, and restaurants. "Industrial operators", or "full-line operators", place their machines in locations such as factories, schools, and hospitals where virtually the same patrons are served every day.

Street operators ordinarily operate the "4 C's" in vending machines -- candy, coffee, cold drinks, and cigarettes, and usually have two to four machines at one location.

Industrial operators will often times locate a bank of equipment at one location

providing a full line of products. The machines placed within banks of equipment are generally larger in capacity and size and have less styling and more uniformity in appearance.

Street operators ordinarily have "console" machines which are smaller in size and capacity and are highly stylized and more distinctive in appearance.

Vending operator companies vary in size. There are national operating companies which are large publicly owned chains listed on the New York Stock Exchange with national or regional coverage. There are independent operators which do business in a smaller number of locations. Some independents are members of buying co-operatives, such as AVA. Additionally, there are some bottlers who are also vending operators. Those bottlers who are also operators generally conduct

their vending operator business as a separate company or division with separate offices, books, personnel, and routes.

In 1958, almost all operators were entirely independent with Canteen Corporation being the only operator company with a national structure.

Beginning in the early 1960's, the industry experienced the growth of several national and large regional operators such as ARA, Servomotion, Macke, Interstate United, Automatique, and Autoviables. These operators engage in both the operation of vending machines and in manual food preparation and service on the location premises.

In the late 1950's and early 1960's, Vendo was interested in becoming a full-line manufacturer[3] of vending machine equipment. Vendo, in fact, successfully used the full-line marketing technique.

Today, Vendo is not a full-line manufacturer.

Both full-line and non-full line manufacturers provide their customers with cosmetic devices for their equipment (such as grills, screens, panels, and headers) which permit their machines to be placed in banks with the machines of other companies.

The use of these cosmetic devices to provide uniform or matching appearances between the machines of different companies reduces somewhat the disadvantage of being a non-full line manufacturer.

Additionally, non-full line manufacturers often times join buying cooperatives in order to diminish the significance of being a non-full line manufacturer.

THE SALE AND ACQUISITION

In 1955, Clarence Adelberg, Executive Vice President of Stoner Manufacturing, suggested to Elmer Pierson, Chairman of the Board of Vendo, that Vendo acquire Stoner Manufacturing. Stoner and Adelberg subsequently met with various Vendo officers in Kansas City to discuss this possibility. However, no agreement was reached at this time. Plaintiffs contend, and Vendo denies, that, during these negotiations, Robert W. Wagstaff, Executive Vice President and General Counsel of Vendo, threatened that, if Stoner did not sell, Vendo would put Stoner out of business.

Nevertheless, both parties agree that Stoner's subsequent decision to sell in 1959 was not prompted by any threat or action by Vendo.

In July, 1956, Vendo acquired Vendorlator Manufacturing Co. ("Vendorlator"), a

manufacturer of bottle vending machines from Fresno, California. As a result of this acquisition, the FTC commenced proceedings against Vendo in 1957 charging that the acquisition would tend to substantially lessen competition within the sub-market of bottle vending machines in violation of Section 7 of the Clayton Act. Before a decision was reached, Vendo and the FTC entered into a consent decree requiring Vendo to secure advance clearance from the FTC before acquiring any other manufacturers of bottle vending machines.

By 1958, Vendo was contemplating possible future developments which included the introduction of an instant coffee machine, a fresh food machine, a hot canned food machine, a cigarette machine, and a candy vending machine incorporating stock rotation and product visibility.

In October, 1958, Bip Glassgold, Stoner Manufacturing's Vice President in charge of sales, again approached Vendo to explore the possibility of Vendo acquiring Stoner Manufacturing. Robert Wagstaff, who had become Chief Executive officer for Vendo in 1958, Henry Gaddis, Vendo's Chief Financial officer, and Elmer Pierson participated in the negotiations for Vendo. Harry Stoner, Joseph Lazzara, Controller of Stoner Manufacturing, Jack Steward, Bip Glassgold, and Everett Johnson, a Senior partner at Arthur Anderson & Co., participated on behalf of Stoner Manufacturing.

From Stoner's viewpoint, the proposed sale to Vendo was advantageous due to Stoner's health problems, the death of Stoner's close associate and Executive Vice President Adelberg, the strain on Stoner from running the firm alone, and

the fact that each of Stoner Manufacturing's shareholders had Stoner stock as one of their principal assets. According to Stoner's affidavit:

> Vendo seemed to be a logical purchaser because no other prospective purchaser had any management people capable of running the business without being educated in the vending machine field. Vendo being experienced in that field will be able to take over with less assistance from me. I am interested in having the business continued by people who have capable management and who will continue to employ and be compatible with our present officers and employees and with a minimum of dislocation of business practices and employment security. I do not want to let the business just drift and carry on of its own momentum, because this cannot continue indefinitely and there is great risk of loss involved in such a program. I attribute our poor showing in sales in 1958, and since, at least in part, to the management difficulties I have already described.

Vendo's purpose in acquiring Stoner Manufacturing was to expand its line of

vending machines, principally through the acquisition of a proven candy machine. An internal Vendo memorandum of October 20, 1958 from Stevens to Wagstaff indicated that, although Stoner Manufacturing's 1958 sales had declined and although the company had certain weaknesses and a few unfavorable factors, Stoner was "the leading supplier" of candy and pastry machines as well as "a major factor in instant coffee equipment." Stevens concluded that the acquisition would be "a big step toward giving us a complete line of equipment." Additionally, Wagstaff reported to Pierson that two other vending machine manufacturers were negotiating with Stoner. Buckley from Vendo's marketing division had indicated that "if Stoner were to fall into the hands of a more aggressive competitor...the entrance of

Vendo into this particular market would be still retarded....."

On April 3, 1959, after extensive negotiations during which various proposals were discussed, Vendo and Stoner Manufacturing, both represented by counsel, entered into a contractual agreement whereby Vendo would purchase the assets of Stoner Manufacturing, including inventions, patents, drawings, designs, and research and development work.

Under the sale agreement, Vendo was to pay Stoner Manufacturing $3,400,000.00 in cash and deliver to it 60,000 shares of Vendo stock. The land and the property constituting the Stoner Manufacturing plant was leased to Vendo at a stipulated rental for ten years with an option of renewal for a like period.

Vendo was also given an option to purchase the property on or after

December 31, 1961.[4] Vendo further agreed to pay to Stoner annually for a period of ten years, or until such time as it might exercise its option to purchase the plant, all profits in excess of $250,000.00 realized from the use of the assets being purchased. Any such amount paid by Vendo was to be credited toward the purchase of the plant. Vendo also agreed to pay, for a period of ten years, 25% of the income received from the foreign production of the machines being acquired.

The acquisition agreement contained the following restrictive covenant:

> Section 15. From and after the closing the Company [Stoner Mfg. Corp.] will not own, directly or indirectly, manage, operate, join, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business engaged in the manufacture and sale of vending machines under any name similar to the Company's present name, and, for a period of ten (10)

> years after the closing, the Company will not in any manner, directly or indirectly, enter into or engage in the United States or any foreign country in which Vendo or any affiliate or subsidiary is so engaged, in the manufacture and sale of vending machines or any business similar to that now being conducted by the Company. The Company also agrees that during its corporate existence it will, without incurring any financial obligation, co-operate with Vendo to prevent the use by others of the names "Stoner" and "Stoner Mfg. Corp." in connection with any business similar to that now carried on by the Company and also agrees not to disclose to others, or make use of, directly or indirectly any formulas or process now owned or used by the Company.

Vendo and Stoner voluntarily sought pre-merger clearance of the acquisition by the FTC, and on May 14, 1959 the FTC sent their clearance letter.

In addition to the sale agreement, the parties executed an employment agreement on June 1, 1959 whereby Stoner agreed to serve as an officer, or in such other

executive or advisory capacity as Vendo requested, consistent with Stoner's physical abilities for five years at an annual salary of $50,000.00. Stoner also agreed to serve as a director of Vendo without additional compensation. As to Stoner's service, the employment contract provided that:

> Stoner shall regulate his own hours of employment and shall determine the amount of time and effort which he shall devote..., it being understood that the value of Stoner's services to the Company [Vendo] are not measured by the amount of time or effort devoted to the business by Stoner but by the value of his advice and counsel in the operation of the Aurora, Illinois, facility, and his know-how, experience and reputation in the vending machine field.

The contract provided that Stoner's employment could be terminated in several ways: (a) Vendo "shall have the right to terminate.. in the event of a substantial

violation of the terms hereof by Stoner", (b) Stoner could terminate "in the event he shall feel that he is not physically able to perform his duties hereunder", or (c) if not terminated by either party, the employment would expire at the end of the five year term or on Stoner's death, whichever came first.

The employment agreement also contained a restrictive covenant which provided that:

> 5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch

> thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or salesman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided, however, that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter.

The period of the non-competition covenants was the same period during which Vendo (a) had the option to purchase the Stoner Manufacturing plant, (b) was to pay out a specified share of profits from the use of the acquired assets, and (c) was to pay out a specified share of the income from the foreign production of the acquired machinery.[5] The term of the non-competition covenants was increased from 5 years to 10 years after Vendo received a

proposal from Stoner that Vendo's then pending offer, which included a 5 year option and payout, be changed to include a 10 year option and payout. The increased term was proposed by Hillix, Vendo's outside counsel in response to Stoner's suggestion. Vendo's press release announcing the Stoner acquisition to the trade stated that "[o]fficers of the Stoner firm will continue in their present capacities,... and there will be no change in the mode of operations."

Vendo prepared a letter, which Stoner signed, to be sent to Stoner's customers. That letter stated: "We do not anticipate any change in Stoner's basic operating policies. We will continue to serve you, our customers, with the same organization we had in the past. Officers of Stoner

Manufacturing will remain unchanged with myself as President."

Another letter drafted by Vendo, and signed by Stoner, was sent to Stoner Manufacturing employees. That letter stated that an independent engineering department would be maintained in Aurora after the sale.

THE BREAKDOWN OF THE PARTIES' RELATIONSHIP

Almost immediately after the closing of the acquisition transaction, Stoner became unhappy because he began losing control of his company.

Shortly after the closing of the sale, Vendo announced that the engineering and research departments of Stoner Manufacturing would be moved to Kansas City. Subsequently, new product research and development was moved to Kansas City, and Vendo's research and development head,

Bobby Andrews, reviewed Stoner Manufacturing's development work and recommended that part of it be dropped.

Stoner was not consulted about these developments and he believed he had been relegated to "senior citizen status."

Within approximately three weeks of the closing of the sale, executive control of operations, sales, and finance was also transferred to Kansas City. None of Stoner's division executives would report to Stoner as president.

Wagstaff set up a meeting in Aurora on June 24, 1959. Stoner maintains that Wagstaff "fired" Stoner at this meeting and that the office of president of the Stoner Division was made "strictly advisory." Wagstaff stated that he told Stoner his job as president was advisory only and Wagstaff stated that he had "no choice but to do what we thought right."

After this June meeting, the general manager of Stoner Manufacturing was to report only to Kansas City. There were occasions when Vendo sought Stoner's advice. Elmer Pierson asked Stoner for his advice regarding coinage. Spencer Childers, who acted as "father confessor" for Vendorlator employees, asked Stoner's advice concerning a FIFO device in August of 1959. Also in August, Stoner was asked to assist in a union dispute which arose over Vendo's removal of some equipment from the Aurora plant.

One of Stoner's primary complaints was Vendo's failure to use Stoner's "design genius and experience" and their failure to put Stoner on Vendo's Products Planning Committee. Vendo stated that they would have put Stoner on the Committee if he had shown some interest in the operations of the company. According to

Vendo's Wagstaff, the relationship between Stoner and Vendo broke down completely:

> ...[A]t the beginning we discussed the changes that we desired to make with him in the plant and got his viewpoint, but Harry felt our viewpoint was so contrary to his that it got to the point that the discussions were just completely incompatible, and there was no point to having them. They outraged him and got him upset, and so those things by attrition just sort of phase out, but not by policy. I think, thought, and still think that one of the difficulties in anything of that sort is getting people to agree, and I think Harry could have made quite a contribution to the operation if he had not been so irritated at us, which he was.

In addition, Stoner refused to attend any of the Board of Directors meetings for the first year and a half after the acquisition.

In mid-1960, Rod Phillips and his son Bill, both of whom had previously worked for Stoner Manufacturing, resigned as engineers for Vendo and solicited Stoner's

financial support. Phillips requested Stoner's assistance in covering the development of the Lektro-Vend vending machine.

Stoner provided the Phillips' with interest-free loans, which aggregated some $200,000.00, during 1961 and 1962. In 1961, when two more Vendo employees [and former Stoner Manufacturing employees) resigned, they joined Rod and Bill Phillips on the research and development project and received monthly salaries aggregating $1,150.00 from Stoner Investments.

Lektro-Vend was responsible for developing the LektroVend FIFO machine. By October, 1962, the development work on this machine had progressed far enough to enable the company to exhibit a prototype of the machine at a trade show. The reaction from the industry was favorable.

At the time of its development, the Lektro-Vend FIFO machine had three dis-

tinct advantages over other vending machines. The first of these advantages was that the FIFO machine could sell candy bars in the same order in which it had been stocked. The FIFO design produced savings to the operator by reducing the risk of having to vend or discard stale items. It also reduced the frequency of service calls to restock the machine.

The second advantage of the model was that it permitted a continuous visible display of the item which was to be vended next. Thirdly, the Lektro-Vend model employed a type of construction which permitted more than one type of product to be stocked on a single conveyor, thus eliminating the need to exhaust one product line before replacing it with a second. While each of these features had been in existence for some years, Lektro-Vend was

the first to combine all of them in a single machine having a practical design.

In 1971, Lektro-Vend began manufacturing a freeze-dried coffee vending machine and, since 1976, has manufactured a glass-front, general merchandising vending machine.

Lektro-Vend's sales and net income after taxes for the fiscal years ending July 31, 1965 through 1977 are set out in the following table:

Fiscal Year Ending July 31	Sales	Net Income (Loss) After Taxes
1965	531,000	($120,000)
1966	815,000	(85,000)
1967	980,000	(119,000)
1968	1,361,000	(259,000)
1969	2,040,000	401,000
1970	1,968,000	97,000
1971	1,779,000	47,000
1972	2,767,000	67,000
1973	2,463,000	(201,000)
1974	2,841,000	(169,000)
1975	1,846,000	(360,000)
1976	1,775,000	(393,000)
1977	2,885,000	(129,600)

In December, 1962, Stoner asked Elmer Pierson, Vendo's Chairman of the Board, to be released from his employment contract, stating that he had an opportunity to invest in the manufacture and sale of the Lektro-Vend machine.

Vendo refused to release Stoner, but asked Stoner to negotiate on Vendo's behalf with the Phillips' to determine whether they had any interest in selling the LektroVend machine.

Stoner wrote to one of Vendo's Vice Presidents, Spencer Childers, stating that the Phillips would be willing to sell the machine for $1,500,000.00, since another company had offered that amount. In March, 1963, Stoner informed Vendo that he had told the Phillips that Vendo no longer had an interest in making the purchase. Childres wrote back stating that Vendo still had such an interest, but that the

asking price was too high. Vendo stated that it would be willing to pay a price sufficient to cover development costs and to return a fair profit.

In the summer of 1963, after Pierson's inquiry, Stoner disclosed to Vendo that he had been loaning money to the Phillips, which loans had been paid back by Stoner's sister-in-law.

It appears, however, that Vendo had heard rumors of Stoner's involvement with Lektro-Vend as early as the 1962 trade show. Elmer Pierson stated that Vendo executives and customers of Stoner had stated that Stoner "was bringing out the superlative in fine candy vending equipment" and that Stoner "apparently had a great interest in the Rod Phillips or the Lektro-Vend Company" and that Stoner "wanted to become more active in Lektro-Vend." Wagstaff testified that Vendo

executives Pierson, Childers, and Carbaugh had told him "that Harry Stoner was financing Lektro-Vend to go into competition with Vendo."

In March, 1964, Stoner Investments contracted to sell to Lektro-Vend a new plant built by Stoner Investments. The purchase by Lektro-Vend was made with the proceeds of a bank loan which was advanced subject to an agreement by Stoner Investments to guarantee the repurchase of the property in the event of a default on the loan.

On April 1, 1964, Stoner ceased being a director of Vendo and was not slated for re-election.

On June 1, 1964, Stoner's employment contract with Vendo expired and the contract was not renewed.

On June 10, 1964, Lektro-Vend issued 5,000 shares of its stock to Mrs. Stoner,

and on July 15, 1964 it issued 5,000 shares of its stock to Stoner Investments.

In March, 1965, Stoner sent a letter to 50 vending machine operators in which he identified himself as the long time former president of the old Stoner Manufacturing Corp., and stated that he was now interested in Lektro-Vend. Stoner sent a copy of this letter to Pierson, who, in turn, forwarded it to Vendo's general counsel Glenn Carbaugh with the notation that Stoner had gone "too far."

HISTORY OF THE PRIOR LITIGATION

In August, 1965, Vendo, defendant herein, filed suit against Harry Stoner and Stoner Investments, plaintiffs herein, in Kane County, Illinois, charging them with breaching non-competition covenants and with theft of trade secrets. After a bench trial, the court found in favor of

Vendo on December 16, 1966 and entered judgments against Harry Stoner in the amount of $250,000.00 and against both Harry Stoner and Stoner Investments in the amount of $1,100,000.00. Additionally, the court enjoined Stoner and Stoner Investments from further acts of competition.

On January 30, 1969, the Illinois Appellate Court for the Second District held that no trade secrets were involved; that the non-competition covenants were valid and enforceable; that defendants, Stoner and Stoner Investments had breached those covenants; and, that the grant of injunctive relief was proper. Vendo Company v. Stoner, 105 Ill.App.2d 261, 245 N.E.2d 263 (2nd Dist. 1969). Additionally, the Court held that the trial court had erred in striking the affirmative defense based on the federal anti-trust laws, but

was correct in denying the defense based on the Illinois anti-trust laws. The case was remanded for a determination of damages and further proceedings.

Upon remand, the defendants withdrew the affirmative defense based on the federal anti-trust laws. Thereafter, the trial court entered judgments totalling $7,363,500.00 against Stoner and Stoner Investments.

A second appeal followed in which the Appellate Court held that the trial court erred in the measurement of damages. The case was again remanded for assessment of damages in accordance with the Appellate Court's original opinion. Vendo v. Stoner, 13 Ill.App.3d 291, 300 N.E.2d 632 (2d Dist. 1973).

On appeal to the Illinois Supreme Court, the Appellate Court was reversed and the trial court judgments were

affirmed. However, in deciding the case, the Supreme Court found the judgments proper under a different theory. The Court held that Stoner had breached his fiduciary duties to Vendo and found the $7,363,500.00 in damages appropriate for this breach. Vendo Co. v. Stoner, 58 Ill.2d 289, 321 N.E.2d 1 (1974).

In 1965, the instant action was filed by Stoner, Stoner Investments, and Lektro-Vend in the federal district court, alleging various federal anti-trust violations by Vendo. The case lay dormant until 1975 pending a resolution of the state court litigation.

In January, 1975, Vendo received from Chicago Title and Trust Company $502,526.09, which was held under an escrow trust agreement and which Vendo applied toward Stoner's payment of the state court judgments in favor of Vendo.

On June 27, 1975, the federal district court granted plaintiffs' motion for a preliminary injunction staying defendant's efforts to collect its state court judgments until the merits of the federal suit could be determined. Lektro-Vend v. Vendo Co., 403 F.Supp. 527 (N.D. Ill. 1975). On appeal, the Seventh Circuit affirmed the district court's order granting a preliminary injunction. Lektro-Vend Corp. v. Vendo Co., 545 F.2d 1050 (7th Cir. 1976).

On June 29, 1977, the Supreme Court reversed the Seventh Circuit's affirmance of the district court's order remanding the cause to the Seventh Circuit for further proceedings in conformity with their opinion. Vendo Co. v. Lektro-Vend Corp., _____ U.S. _____, 97 S.Ct. 2881 (1977). On August 19, 1977, the Court of Appeals remanded the case to the district

court "for further proceedings in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977."

A petition for rehearing was timely filed in the Supreme Court and denied on October 3, 1977. Nevertheless, on August 29, 1977, Stoner Investments filed proceedings under Chapter XI of the Bankruptcy Act, and an automatic stay was entered, enjoining Vendo and other creditors from enforcing their claims against Stoner Investments.

Meanwhile, plaintiff's [sic] herein advanced the position in the district court that the injunction which it had issued continued to be binding in spite of the Supreme Court's opinion of June 29, 1977. Consequently, Vendo filed a motion in the district court asking that the preliminary injunction previously issued be formally dissolved. The district court

refused to dissolve the injunction and stated that, if Vendo attempted to collect its state court judgments, it would be risking contempt proceedings.

Thereafter, petitioner filed a motion for clarification in the Supreme Court, which that Court treated as a petition requesting the Supreme Court to mandamus the district court to dissolve the injunction. The Supreme Court held that the motion for clarification, actually being a motion for mandamus, did not comply with rules regarding a writ of mandamus, and accordingly, denied the petition for clarification of judgment without prejudice to the filing of a motion for leave to file a petition for mandamus. Vendo Company v. Lektro-Vend Corp., ____ U.S. ____, 98 S.Ct. 702 (1978).

The mandamus petition did not issue, however, since the district court formally dissolved the injunction on April 6, 1978.

Thereafter, Judge Eisen denied Vendo's motion to dismiss the Bankruptcy Proceedings and to vacate the stay issuing from the Bankruptcy Court enjoining Vendo and other creditors from enforcing their claims against Stoner Investments. Vendo has appealed this decision.

THE PRESENT LITIGATION

The dispute in this case involves the purpose, effect, and legal significance of the acquisition of Stoner Manufacturing and the employment of Stoner by Vendo.

On the one hand, plaintiffs contend that the sale and acquisition of Stoner Manufacturing are not now and never were legally effective because the acquisition agreement, including the employment con-

tract of Stoner, violated the federal anti-trust laws. According to plaintiffs, Vendo's sole purpose in acquiring Stoner Manufacturing was to eliminate Stoner, "the design genuis", from competition in the manufacturing and sale of vending machines. This anti-competitive intent, argues plaintiff, is demonstrated by Vendo's exaction of overbroad restrictive covenants which, plaintiff maintains, constitute contracts in restraint of trade in violation of §1 of The Sherman Act. Additionally, plaintiffs argue that Vendo's anti-competitive purpose is also demonstrated by Vendo relegating Stoner to "senior citizen" status shortly after the acquisition took place; by removing Vendo's Aurora Division, formerely Stoner Manufacturing, from under Stoner's control by refusing to release Stoner from his employment with Vendo so that he could

become actively involved with the Phillips and Lektro-Vend; and by refusing to accept Stoner's advice that Vendo purchase the Lektro-Vend machine.

Plaintiffs also argue that Vendo's knowing exaction of unenforceable and voidable restrictive covenants, and the subsequent enforcement of those covenants in the state court litigation, constitute overt acts in pursuit of Vendo's attempt to monopolize in violation of Section 2 of The Sherman Act.

As a third argument, plaintiffs contend that the acquisition constituted a merger which substantially lessened competition in violation of Section 7 of the Clayton Act.

Vendo, on the other hand, maintains first, that the covenants not to compete exacted from Stoner and Stoner Manufacturing do not constitute contracts in re-

straint of trade in violation of §1 of The Sherman Act. Vendo argues that these covenants not to compete were not over-broad; were exacted, not to restrain competition, but rather to protect its purchase of Stoner Manufacturing and its employment of Stoner; and were ancillary to the main sale and employment agreements. It is Vendo's contention that their primary reason for obtaining these covenants was to insure that Stoner did not use Vendo's money and facilities to go into competition with Vendo subsequent to the sale. Additionally, Vendo maintains that no adverse market impact resulted from these covenants. Also, contends Vendo, plaintiffs alleged anti-trust claims are barred by the doctrine of in pari delicto.

Second, Vendo maintains that there is no §2 Sherman Act violation because there

is no evidence that Vendo had the means to monopolize, and because the state court proceedings brought to enforce the non-competition covenants were justified on the grounds of Stoner's breach of those restrictive covenants or breach of fiduciary duties.

Third, Vendo argues that no §7 Clayton Act violation exists because the acquisition was a valid product extension merger and had no anti-competitive impact.

After hearing the evidence proffered at trial and reviewing all the materials and information submitted in this case, a summary of this court's view of the events is as follows.

Sometime between 1957 and 1959 after Stoner's first offer to sell Stoner Manufacturing to Vendo, Stoner Manufacturing lost several of its important officers including Adelberg, who had been Stoner's

close associate and Executive Vice President. During this same period of time Stoner's health was failing, Stoner Manufacturing was failing, and the strain on Stoner in running the firm alone caused him to be concerned about the future management of Stoner Manufacturing, and the effect that continued loss of profits would have on its employees and shareholders.

As a result, Stoner considered it advisable to sell Stoner Manufacturing and, consequently, Stoner approached Vendo for a second time as a likely purchaser. Since Vendo was in fact interested at this time in expanding its line of vending machines the parties were able to reach an agreement acceptable to each for the sale and acquisition of Stoner Manufacturing.

Pursuant to the sale agreement, Vendo agreed to pay Stoner $3,400,000.00 in cash

and deliver 60,000 shares of Vendo for the purchase of Stoner Manufacturing, including inventions, patents, drawings, designs, and research and development work.

Included in the sale of Stoner Manufacturing were provisions for Vendo to lease the land and property of Stoner Manufacturing in Aurora, Illinois, with an option to buy on or after December 31, 1961.

Additionally, Vendo agreed to pay all profits in excess of $250,000.00 realized from the use of assets being purchased and, for a period of ten years, 25% of the income received from the foreign production of the machines being acquired from Stoner Manufacturing.

In exchange, Stoner Manufacturing was to refrain from competing with Vendo for a period of ten years.

Stoner also entered into an employment agreement with Vendo whereby Vendo would pay Stoner $50,000.00 a year for five years for Stoner's services as an officer of Vendo. Stoner would also serve as a director of Vendo without additional compensation. Additionally, Stoner could regulate his own hours consistent with his health.

In exchange for this employment, Stoner agreed not to compete with Vendo for a period of ten years.

Originally, these restrictive covenants were to run for a period of five years, but because Stoner wanted a ten year payout, the restrictions were increased to cover the same ten year period.

Shortly after the consummation of the sale, Stoner became dissatisfied with the arrangement apparently because he felt that Vendo was ignoring his advice and

counsel and relegating him to "senior citizen status." In addition, Vendo moved a large part of the Stoner Manufacturing operation, Vendo's Aurora Division, to St. Louis contrary to Stoner's expectations when he entered into the agreements.

Several of Stoner's former employees stayed behind, declining to make the transfer to St. Louis. Two of these employees, Rod and Bill Phillips, approached Stoner and successfully obtained his assistance in establishing Lektro-Vend, a new vending manufacturing company, which eventually produced a successful FIFO machine. Stoner gave, at the least, financial support and the property on which to establish the plant, and took a large financial stake in Lektro-Vend. By late 1962, after the successful exhibition of the Lektro-Vend machine, Stoner advised his former customers that

he had gone into business with Lektro-Vend, and asked to be released from his employment contract with Vendo in order to pursue his investment in Lektro-Vend. Vendo refused.

In 1965, after the expiration of Stoner's employment with Vendo, Vendo filed suit in state court alleging that Stoner breached the restrictive covenants contained in both the sale and employment agreements. Vendo obtained judgments throughout the lower courts in its favor on the ground that Stoner had breached the restrictive covenants. Eventually, the Illinois Supreme Court upheld the judgments in the total amount of $7,363,500.00 in Vendo's favor but on the grounds that Stoner had breached his fiduciary duties as an officer and director of Vendo.

While not a party to these state court actions, one of the plaintiffs here,

Lektro-Vend, alleges it suffered in its business venture as a result of the state court judgments obtained against Stoner Investments, LektroVend's primary source of financial support. It is this alleged loss of sales and business that plaintiffs maintain constitute an injury cognizable under the federal antitrust laws.

CONCLUSIONS OF LAW

It is agreed that the jurisdiction of this court is founded on the Sherman and Clayton Acts, 15 U.S.C. §§1, 2, 4, 7, 15, 16, 18 and 26.

The parties have agreed that the legal standard to be applied is one of federal law. See also, Schine Chain Theatres v. U.S., 334 U.S. 110, 119 (1948).

First, before reaching the substantive anti-trust allegations, this court

will consider the affirmative defenses raised by defendants.

Contrary to defendant's contentions, the doctrine of collateral estoppel does not bar this court from deciding factual issues de novo in the instant case as they relate to the anti-trust issues here presented. Defendants here contend that under the doctrine of collateral estoppel, this court is bound by the findings of fact of the state courts. In analyzing whether this court is collaterally estopped by a prior judgment or determination, four questions must be answered in the affirmative to support the application of that doctrine: 1) whether the issues sought to be concluded are the same as those involved in the prior action, 2) whether the issues involved were in fact litigated in the prior actions, 3) whether the issues involved were in

fact judicially determined in the prior action, and 4) whether the judgment in the prior action was dependent upon the determination made of those issues. See, Moore's Federal Practice, Vol. 1B ¶0.443[1] p. 3902. In the instant case, it is clear that none of these questions may be answered in the affirmative. This is confirmed by the Illinois Supreme Court's statement in Vendo v. Stoner, 58 Ill.2d 289, 321 N.E.2d 1, 12 (1974):

> At the original trial defendants [plaintiffs here] raised an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act (Ill.Rev.Stat. ch.38, par. 60-1 et seq. [1973]) and the Federal anti-trust laws (15 U.S.C. §1 et. seq.). The latter charge was withdrawn by defendants on the remand, and references in the record indicate that at some point a suit was filed against plaintiff in the United States District Court for the Northern District of Illinois relating to

the alleged violations of federal law.

With respect to the state antitrust claim the appellate court on the first appeal affirmed the action of the trial court in striking the affirmative defense and counterclaim. On remand, defendants unsuccessfully sought to reinstate their defenses and counterclaim, and the appellate court again affirmed the judgment of the trial court in this respect. By leave of court the State of Illinois has filed a brief supporting defendants' position on this issue.

There is some dispute between the parties as to whether the first opinion of the appellate court was based on the theory that the Illinois act was preempted by the Federal antitrust laws or upon the inapplicability of the Illinois act because of the absence of a substantial impact in Illinois arising out of the acts complained of.

We prefer to dispose of this issue on another ground namely, that the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants.

From this passage it is clear that the state court gave no consideration to the federal anti-trust claims presented here. Consequently, this court is not bound by the findings of fact made in the state courts, and must therefore determine the facts as they relate to the alleged anti-trust claims.

Moreover, we note that there is authority for the broad proposition that "the grant to the district court of exclusive jurisdiction over the action for treble damages should be taken to imply immunity of their decision from any prejudgment elsewhere." Lyons v. Westinghouse, 222 F.2d 184, 189 (2d Cir. 1955) cert. denied 350 U.S. 825; Mach-Tronics, Inc. v. Zipoli, 316 F.2d 820 (9th Cir. 1963).

As a practical matter, however, this court notes that our findings of facts,

which overlap the findings made in the state courts, do not differ substantially from the findings previously made.

Defendant also contends that plaintiffs, Stoner and Stoner Investments, are barred from seeking damages under the doctrine of in pari delicto. It is defendant's claim that, since Stoner and Stoner Manufacturing were willing, knowledgeable participants and represented by counsel in negotiating the 1959 agreements, they must, as a consequence, be held equally responsible for the final terms of those agreements, and, therefore, be barred from challenging any aspect of these agreements under the anti-trust laws.

This court cannot say, however, that the instant facts support the application of the in pari delicto defense. In Perma-Life Mufflers, Inc. v. International Paper Corp., 392 U.S. 134 (1968), the Supreme

Court held that the doctrine of in pari delicto was not a defense to an anti-trust action. Although the Perma-Life Court noted that there may possible be exceptions to this general rule, the record in the instant case does not support defendant's contention that the facts in the instant case fall within the exceptions delineated in Perma-Life. There is no evidence in the record, for instance, that plaintiffs actively or actually favored or supported the ten year restrictive convenants that became the terms of the final agreements. On the contrary, here, as in the Perma-Life case, these clauses "were quite clearly detrimental to their interests, and they alleged that they had continually objected to them." 392 U.S. at 139. This record does not support the conclusion that plaintiffs were "collaborator(s), or coadventurer(s), or true

particeps criminis" with respect to the restrictive convenants which now form the basis of the present complaint. Consequently, defendant's in pari delicto defense must be rejected.

Defendants next contend that the claims here are barred by the four year statute of limitations under §4b of the Clayton Act. 15 U.S.C. §15b. However, it is well settled that the period of this statute of limitations commences to run from the last overt act of the alleged conspiracy. Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321 (1970); Weber v. Consumer Digest, Inc., 440 F.2d 729, 731 (7th Cir. 1971). Thus, while the execution of the 1959 agreements, which forms the basis of plaintiff's claims, fall outside of the applicable time period, the filing of the state court suits in 1965 constitutes the last

alleged overt act committed pursuant to the conspiracy charged, and, consequently, the filing of this action in 1965 was well within the four year statute of limitations period.

Moreover, it has been held that under §4b the statute begins to run at the time the plaintiff suffers injury and not necessarily at the time the merger is consummated. See, Metropolitan Liquor Co., Inc. v. Heublein, Inc., CCH 1970 Trade Cases ¶ 72,990 (Wisc. 1969). In the instant case, the alleged anti-trust injury suffered by plaintiff was the collection of the state court judgments which did not occur until 1974 when the Illinois Supreme Court upheld the damages award. Consequently, the instant action is not barred under ¶ 4b of the Clayton Act.

We turn now to a consideration of the substantive anti-trust claims. First, this court must determine the relevant geographic and product markets, a determination necessary for purposes of analyzing both the Sherman Act and the Clayton Act claims. See, e.g. U.S. v. E.I. duPont de Nemours and Co., 351 U.S 377, 394 (1956); U.S. v. E.I. duPont de Nemours and Co., 353 U.S. 586, 593 (1957); and Brown Shoe Co. v. U.S., 370 U.S. 294, 324 (1962).

For purposes of defining a relevant product market, or "line of commerce," under §§ 1 and 2 of the Sherman Act and under § 7 of the Clayton Act, Department of Justice Guidelines provide the following critieria:

> The sales of any product or service which is distinguishable as a matter of commerical practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint

> of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in the market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and use from the standpoint of that group of purchasers for whom the two products are interchangeable.

Trade Reg. Rep. ¶ 4430, par. 3(i) at 6682. In Brown Shoe Co., Inc. v. U.S., 370 U.S. 294, 324 (1962), the Supreme Court set forth the critical elements to be considered in determining valid product markets and potential submarkets:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product

> itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-595, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

See also, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 399 (1956); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 710 (7th Cir. 1977), cert. denied 439 U.S. 822 (1978); and Bendix Corporation v. Galax, Inc., 471 F.2d 149, 161 (7th Cir. 1972) cert. denied 414 U.S. 819 (1973).

Recently, in Sargent-Welch, supra, the Seventh Circuit noted that:

> The most important of these factors is uniqueness of the product's functions and therefore its uses. If two products are 'reasonably interchangeable by consumers for the same purposes,' they are considered to be in the same market. [Citations omitted]. We have said on two relatively recent occasions, however, that a market definition 'which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful. Cass Student Advertising, Inc. v. National Education Advertising Service, Inc., 516 F.2d 1092, 1095 (7th Cir. 1975), cert. denied 423 U.S. 986, quoting from L. G. Balfour Co. v. FTC, 442 F.2d 1, 11 (7th Cir. 1971), which in turn quotes from United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 592 (S.D. N.Y. 1958).

567 F.2d at 710.

Plaintiffs, relying on Seeburg Corporation v. Federal Trade Commission, 425 F.2d 124, 126 (6th Cir. 1970), cert. denied 400 U.S. 866 (1970), argue that the relevant product market includes coin operated vending machines for food, bever-

ages, and tobacco products. In support of this proposed market, plaintiffs contend that the "location is the market," because all vending machines compete for space at vending machine locations and therefore, have a similarity of use. Additionally, plaintiffs assert that there is a similarity in the channels of distribution employed by manufacturers within this market; that there is a similarity as to product characteristics and as to methods of production of vending machines; and that all vending machines sell products which satisfy refreshment needs of consumers at vending locations.

Defendant, on the other hand, argues that plaintiffs' proposed definition of the market is unsupportable because it ignores the fundamental distinction between two basic classes of customers for vending machines, which, defendant argues,

properly characterizes the competitive realities of the market place and accordingly meets the applicable legal standards laid down by the Supreme Court in duPont and Brown Shoe, supra. Defendant would define the product market according to two classes of customers for vending machine manufacturers: soft drink bottlers (e.g., the Coca-Cola bottling companies), which only purchase machines that vend soft drinks, and vending service companies, customarily referred to in the trade as "operators", which purchase vending machines for the sale of food, beverages, and other items typically manufactured by others, including vending machines for hot, cold, and frozen foods, dairy products, coffee, candy, pastry, snacks, ice, soft drinks, and cigarettes.

Despite defendant's contention to the contrary, this court does not perceive a

significant dispute between the parties as to the appropriate product market for purposes of this case. Whether we view the overall product market from the standpoint of the "location" as plaintiff suggests, or from the standpoint of the customers served as defendant suggests, the products market in the instant case consists of all coin-operated vending machines for the sale of food, beverages, and cigarettes, including vending machines for hot, cold, and frozen foods, dairy products, coffee, candy, pastry, snacks, ice, soft drinks, and cigarettes. It is clear to this court that whether we focus on the two different customers for vending machines, bottlers and operators, as defendant argues, or the location as plaintiffs argue, the reasonable interchangeability of use or cross-elasticity of demand between the product itself and

substitutes for it are the same whether the manufacturer is selling to different operator customers (as opposed to bottlers) or is competing for space at locations for vending machines.

The parties agree that the geographic market encompasses the entire United States.

As the following analysis demonstrates, this court must conclude that the requisite anti-trust injury has not been demonstrated by plaintiffs and that no anti-trust violations have been shown.

In essence, plaintiffs' claim of antitrust injury is as follows. In 1965, Lektro-Vend possessed the probable ability to manufacture vending machines which would be superior to other competitive equipment. However, argues plaintiff, Lektro-Vend's potential was nipped in the bud when Vendo successfully obtained

judgment in the state courts against Stoner and Stoner Investments, Lektro-Vend's chief source of financial support. Because Lektro-Vend was rendered unable to effectively compete as a consequence of these judgments, Vendo is guilty of anti-competitive conduct. In other words, if Vendo had not acquired Stoner Manufacturing and employed Stoner; if Vendo had not exacted non-competition covenants from both Stoner and Stoner Manufacturing; and, if Vendo had not enforced those covenants against Stoner and Stoner Manucturing, then Lektro-Vend would have become a significant competition in the vending machine industry. Consequently, maintains plaintiff, Vendo's acquisition of Stoner manufacturing and employment of Stoner, including the exaction and enforcement of allegedly overbroad non-competition cove-

nants, must violate the anti-trust laws due to the later effect on Lektro-Vend.

To accept plaintiffs' characterization of this situation would put the cart before the horse and would in this court's opinion not only result in a misapplication of the anti-trust laws, but more significantly would seriously undermine the law of contracts.

As will be shown, plaintiffs offered little evidence to show that the terms and conditions of Vendo's acquisition of Stoner Manufacturing and employment of Stoner violated the anti-trust laws. The mere fact that Lektro-Vend, a company whose existence was made possible only by this acquisition and employment transaction and the monies Stoner received therefrom, suffered economically when these transactions broke down cannot alone

establish violation of the anti-trust laws.

On the contrary, this court views the relevancy of Lektro-Vend's existence, if any, as merely substantiating Vendo's decision to include non-competition covenants in Stoner's employment contract and the sale contract because of its concern, at the time Stoner Manufacturing was acquired, that Stoner would use the money obtained from Vendo to attempt to compete with it.

First, this court concludes that plaintiffs contention that the covenants not to compete violate §1 of the Sherman Act cannot be substantiated by the record.

> Section 1 of the Sherman Act prohibits: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations....

15 U.S.C. 1.

Plaintiff contends that the covenants were overbroad and that their purpose and effect were primarily directed toward the elimination of Stoner as a competitor. This court disagrees.

It has long been established that the Sherman Act, apart from certain per se offenses, only prohibits those contracts and combinations which "unreasonably" restrain trade when analyzed in their business and economic context. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S.C. 36 (1977). It has also been uniformly recognized that non-competition covenants ancillary to the sale of a business or contained in employment contracts are subject to this Rule of Reason and are not per se illegal. E.g., Snap-On Tools Corp. v. FTC, 321 F.2d 825, 837 (7th Cir. 1963); Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 666 (2nd

Cir. 1974); United States v. Empire Gas Corp., 527 F.2d 296, 307 (8th Cir. 1976), cert. denied 429 U.S. 1122 (1977). See also National Society of Professional Engineers v. United States, 435 U.S. 679, 689 (1978)(per Stevens, J.), specifically reaffirming the Rule of Reason "as a standard for testing enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business"; and Bork, Ancillary Restraints and the Sherman Act, 15 ABA Antitrust Section Proceedings 211, 212 (1959) ("The ancillary restraint is ... tested in the same manner as all other non-per se restraints. The function of ancillarity, then, is to remove the per se label from restraints otherwise falling within that category.").

Under federal law, a non-competition covenant is legal under two conditions:

> (1) the covenant is merely ancillary to the main purpose of a lawful contract;
>
> (2) the covenant is necessary to protect the legitimate property interests purchased by the covenantee. See United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136. Moreover, a covenant not to compete examined in light of other monopolistic practices can be declared illegal even if otherwise lawful if it can be shown that the object and the effect of the agreement was primarily directed at the elimination of competition.

Schine Chain Theatres v. United States, supra; Bowl America, Inc. v. Fair Lane, Inc., 299 F.Supp. 1080 (D. Md. 1969)." 403 F.Supp. 527, 532-3. (App. 1, 532-3).

In considering the restrictive, non-competition covenants in the instant

case in light of the Rule of Reason test, it is this court's duty as fact finder to weigh "all circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977). Of primary importance is the "market impact" of the alleged restraint (Id. at 50) and "the challenged restraint's impact on competitive conditions" (National Society of Professional Engineers, supra, 98 S.Ct. at 1363). In this vein, this court finds it noteworthy that there appears to be an absence of even a single decision condemning under the antitrust laws the kind of covenant involved in this case.

Bradford v. New York Times Co., 501 F.2d 51 (2d Cir. 1974), is very much in point. There, the Second Circuit rejected

an antitrust attack on a post-term employment contract broadly providing that

> ... during the period that payments are to be made under the [Incentive Compensation] Plan and in consideration of such payments I will not engage in any business or practice or become employed in any position in competition with The Times or which is otherwise prejudicial to the interests of The Times and that I will hold myself available to The Times for reasonable consultation and other services.

501 F.2d at 54.

The Court emphasized the distinction "between, on the one hand, a covenant barring an employee or partner from competing while he is employed or engaged in the business of the partnership...and covenants by the seller of a business and its good will to refrain from competing with the buyer...and, on the other hand, covenants which bar an employee from competing after he has severed his rela-

tionship with his employer...." The Court then held:

> There is more flexibility in the first two categories in determining whether or not the covenant is reasonable because the employee or seller is receiving some consideration for the covenant - his salary is being paid or he had received consideration for the sale of the good will. The employee in the last category, however, may become a public charge, and, in any event, it is distasteful to curtail his opportunity to make a living. The case before us presents no such elements of unfairness.... There was a continuing consideration being paid for his loyalty and good will. While this was a restraint upon his liberty, it can hardly be described as unreasonable. (Emphasis added).

501 F.2d at 58. See also Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1083 (2nd Cir. 1977) ("Nor did Gross show anti-competitive impact, industrial practice, etc. such as might conceivably warrant a finding that the scope of the restriction enforced was unreasonable").

In United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), the defendant (which had approximately 50% of the market) had obtained 3,239 non-competition covenants signed by its employees, and had also entered into 81 different acquisition agreements containing non-competition covenants. In rejecting the Government's attack on these covenants as allegedly constituting an unreasonable restraint of trade, the Eighth Circuit stated that "Covenants of these two types have not generally been considered violative of the antitrust laws" and "Covenants not to compete executed in conjunction with the purchase of a business allow the purchaser to obtain the value of the good will for which he had paid." The Court held:

> The difficulty with the Government's position is that there is no showing that any restraint was unreasonable so as to violate the Sherman Act. Counsel

> for the United States apparently believes that the burden is on Empire to establish the reasonableness of each of the more than 3,000 contracts with their varying terms. However, the burden of showing unreasonableness of a restraint of trade, except where there is a per se violation of the Act, is on the plaintiff....In addition, the record is barren as to the actual effect of these covenants on competition in the LP retail market.... We agree with the district court's conclusion that the mere existence of a large number of covenants not to compete does not establish a 15 U.S.C. § 1 violation. (Citations omitted).

537 F.2d at 308. See also Goldberg v. Tri-States Theatre Corp., 125 F.2d 20, 30-32 (8th Cir. 1942).

If anything, the law of the Seventh Circuit is even more favorable to the antitrust validity of non-competition covenants. See, e.g., Harrison v. Glucose Sugar Refining Co., 116 Fed. 304 (7th Cir. 1902); Snap-On Tools Corp. v. FTC, 321 F.2d 825, 837 (7th Cir. 1963).

At issue in Harrison was the validity of a covenant by an employee, in a contract by which he was employed for five years, that he would not during such term compete with his employer at any place within a radius of 1,500 miles from the employer's principal place of business. The Seventh Circuit held that this covenant was not against public policy and was not void as in restraint of trade:

> The doctrine of restraint of trade had its birth in conditions anciently obtaining, and now greatly changed. Then the area of trade was confined within narrow territorial bounds. Intercommunication has become largely extended, and trades anciently limited to a small locality have become national in their extent. The rule is bottomed upon the consideration whether such a covenant was broader than the covenantee required for his protection.
>
> * * * *
>
> Notwithstanding some authorities which seem to have followed blindly the ancient rule, over-

> looking the reason of the rule and the changed conditions, it is not just to limit the territory within which restraint may be applied by any arbitrary geographical bounds, without regard to the nature and extent of the business in which the restraint is sought to be imposed.
>
> * * * *
>
> Clearly, under such circumstances no public policy would be violated in upholding the covenants. He is not deprived of the opportunity to obtain the means of subsistence or of giving to the public the benefit of his skill in the business to which he has been accustomed. He has only to perform the duty which he engaged to perform to render himself and his family comfortable. We know of no public policy which requires us to sanction the bald violation of a contract lest the public should be deprived of the peculiar skill of the appellant because he will not exercise that skill where he has engaged to exercise it.

116 Fed. at 308-310.

Similarly, in the Snap-On Tools case, supra, 321 F.2d at 837, the Seventh Cir-

cuit sustained challenged post-term covenants even under § 5 of the FTC Act (a more restrictive provision than the Sherman Act), on the ground that the FTC had failed to develop facts in the record showing any substantial restraint of trade.

In the instant case, this court concludes that the noncompetition covenants exacted from Stoner and Stoner Manufacturing were ancillary to the main purpose of lawful contracts. From the view of both plaintiff and defendant, the sale and acquisition of Stoner Manufacturing was clearly the purpose behind the execution of the agreements. In fact, this court finds plaintiffs' contention that the main purpose of the sale and acquisition was to eliminate Stoner from competition to be incredible, particularly in view of the fact that it was Stoner who

first approached Vendo concerning Vendo's possible purchase of Stoner Manufacturing and it was Stoner who sought the ten year as opposed to five year payout, which resulted in the terms of the covenants being increased from five to ten years.

Moreover, based on the fact that Stoner became involved with Lektro-Vend within a year or two after selling Stoner Manufacturing, and considering the substantial financial commitment of Vendo in purchasing Stoner Manufacturing, it appears to this court that the restrictive covenants in the instant case were clearly necessary to protect Vendo's interests in the acquired business and employment of Stoner.

Additionally, plaintiffs' contention that the restrictive, non-competition covenants are overbroad is without merit under the circumstances of this case.

Before the 1959 acquisition, it is indisputable that Stoner Manufacturing as well as Vendo operated throughout the United States and abroad and that Stoner Manufacturing's contract provided for additional payments from Vendo based on world-wide sales. Nevertheless, in addition to the preposterous contention that Vendo's real purpose for the 1959 acquisition was to obtain the covenants, plaintiffs argue that the covenants were illegal (a) because they were "couched in terms of prohibiting competition wherever the acquiring company (Vendo) was operating or intended to operate" rather than being phrased in terms of Stoner's operations, and (b) because they applied to "all products Vendo manufactured and sold" rather than just those manufactured by Stoner.

Even apart from the fact that we are dealing with "in-term" and not post-term covenants, there is not the slightest basis for holding the covenants illegal on either of the suggested grounds.

It should be emphasized that Stoner's misconduct did not relate to some foreign land or some product far removed from Stoner's prior operations. On the contrary, the secret development of the Lektro-Vend machine took place right in Aurora, Illinois, and the Lektro-Vend machine was also a candy-vending machine.

Also, Stoner's misconduct took place not long after the execution of the 1959 agreements. In these circumstances, there was no attempt whatever to enforce the covenants as to any place or any product which the plaintiffs could conceivably claim was "over broad". Vendo's state court suit and the judgments it obtained

were based only on activities of Stoner in the United States and on Vendo's loss of its U.S. market share with respect to candy machines. That being so, plaintiffs' objection to the phrasing of the covenants is irrelevant. See, e.g., Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082-83 (2nd Cir. 1977), cited by the plaintiffs: "Thus, Gross has not proved that the Partnership knowingly enforced the arguably overbroad portion of the non-competition clause."

Additionally, there is authority for the position that, irrespective of the language used in a non-competition covenant, if the violation takes place within the area in which the restraining covenant would be reasonable, the covenant should be enforced limited to the area in which the restraint is reasonable. J.D.

Calamari & J.M. Perillo, The Law of Contracts (1st Ed. 1970).

While it might be argued that the ten year restrictive covenants in this case are overbroad, that is not the essential inquiry here. Of primary importance is the "market impact" of the alleged restraint (GTE Sylvania, supra, 433 U.S. at 50), and "the challenged restraint's impact on competitive conditions" (National Society of Professional Engineers, supra, 435 U.S. 688). The way in which a covenant is phrased tells nothing about its "market impact". And, unless there is a significant adverse "market impact", the covenant does not violate the Sherman Act. In Northwest Power, the Court specifically stated that "[t]o prove an antitrust violation under the rule of reason, [plaintiff] must show the defendants' conduct adversely affected com-

petition." Northwest Power Products, Inc. v. Omark Industries, Inc., 1978-2 Trade Cases ¶ 62,142 (5th Cir.) at p. 75,042. (Emphasis added). "Absent anti-competitive effect, an unlawful intent will not establish a rule of reason violation...nor will the use of unfair methods of competition." H & B Equipment Co. v. International Harvester Co., 1978-2 Trade Cases 62, 136 (5th Cir. at p. 75,012.

Plaintiffs have failed to carry their burden of establishing an adverse "market impact" that would render these covenants unreasonable under the Rule of Reason and, therefore, violative of § 1 of the Sherman Act. E.g., United States v. Empire Gas Co., 537 F.2d 296, 307-08 (8th Cir. 1976); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082-83 (2d Cir. 1977).

As the following discussion makes clear, plaintiffs have not, nor could they

in this court's opinion, establish that the five year restrictions, the enforcement of which were limited to the Aurora, Illinois area, adversely affected the market or competition so as to render these covenants unreasonable and violative of the anti-trust laws.

Finally, this court concludes that neither plaintiffs' § 2 Sherman Act claim nor its § 7 Clayton Act claim is supported by the record so that these otherwise lawful restrictive covenants are rendered unlawful by these other alleged monopolistic practices.

Section 2 of the Sherman Act provides in pertinent part that:

> Every person who shall monopolize, or attempt to monopolize,...any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor....

In order to prove an attempt to monopolize, the plaintiff must establish: (1) the relevant market in which the attempt allegedly took place; (2) a dangerous probability that the defendant would have achieved monopoly power in that market; and (3) the defendant's specific intent to achieve such monopoly power. See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177-78 (1965); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 295-97 (7th Cir. 1974).

Plaintiffs do not contend that Vendo ever had a monopoly - an initial prerequisite to "monopolization" under Section 2 of the Sherman Act. Instead, plaintiffs charge that Vendo has attempted to monopolize the manufacture of "coin operated food and beverage vending machines" in violation of Section 2.

However, as the Supreme Court pointed out in American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946), the offense of attempt to monopolize requires proof of "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it...."

Plaintiffs have failed to prove the requisite elements of a Section 2 offense for the following reasons.

In arguing that Vendo had the requisite power to support a finding of dangerous probability, plaintiffs offer bare statistics as to Vendo's size, market share, sales, and profits and then sweepingly conclude that "[t]he evidence in this record has sufficient specificity as to relevant market, total market and

market shares to satisfy any standards that may be required under the reported cases." However, plaintiffs not only misconceive the applicable legal standard, but, in addition, an analysis of Vendo's business refutes any notion of a dangerous probability of achieving monopoly power.

Although not dispositive of the instant case, Vendo's business subsequent to the purchase of Stoner Manufacturing is worth noting.

Plaintiffs cite the fact that Vendo's sales and profits increased from 1955 to 1966, yet fail to note that between 1960 and 1963, the initial years of the "fabulous 60's", Vendo's sales declined from $61 million to $52 million and its profits fell from $3.1 million to $1.9 million. In 1966, the best year Vendo ever had, its net income as a percentage of sales was only 7%. Since then that figure has

averaged only 0.7%, sales have been stagnant (even ignoring inflation), and profits have declined, culminating in significant losses in the last four years totalling nearly ten million dollars.

Vendo's failing health is reflected in its market share statistics as well. In every area of its business, Vendo's share has declined. In operator products, Vendo fell from a high of 22.5% in 1966 to a low of 7.4% in 1974. As the Illinois Supreme Court found in the ten years following the Stoner acquisition, Vendo's share of the candy market was cut in half. 48 Ill.2d at 311. By 1972 Vendo was completely out of the candy and cigarette vending machine business. Under plaintiffs' definition of the relevant market and the figures they have offered, Vendo's share declined from 33% in 1966 to 24% in 1973.

Plaintiffs argue that 1959-66 is "the time period most immediately relevant to this suit." Even if this were correct -- and no support is cited for such a contention -- the test in an attempt case (as previously indicated) is whether there is dangerous probability that defendant would attain monopoly power. Here, rather than speculating as to what would happen in the future (as most courts must of necessity do in evaluating alleged attempts to monopolize), this court has the benefit of observing what actually happened in the marketplace. Vendo did not achieve a monopoly or come dangerously close.

Furthermore, plaintiffs do not offer one case in which a finding of an attempt to monopolize was based on a market share of the size attributed to Vendo -- even apart from the fact that Vendo's share has been declining. Compare, e.g., United

States v. Empire Gas Corp., 537 F.2d 296, 305-07 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973-75 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969); Cal Distributing Co. v. Bay Distributors, Inc., 337 F.Supp. 1154, 1159-60 (M.D.Fla. 1971); Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co., 1972 Trade Cases ¶ 73,955 (W.D. Tenn.) at pp. 92,005-07; SCM Corp. v. Radio Corp. of America, 318 F.Supp. 433, 472-73 (S.C. N.Y. 1970) [sic]; Diamond International Corp. v. Walterhoefer, 289 F.Supp. 550, 578 (D.Md. 1968). Indeed these cases demonstrate that not even a 50% market share is in itself sufficient to establish the requisite dangerous probability.

In Empire Gas, supra, the Eighth Circuit held that, "...even if we accept the Government's survey as proof that

Empire had 50% of the Lebanon market and 47% of the Wheaton market, that alone is not sufficient to show a dangerous probability of success." 537 F.2d at 305. The Government argued that Empire's large market shares in conjunction with its anticompetitive conduct gave rise to a dangerous probability that it would be able to control prices in the two markets. The Court concluded, however, that there was no proof that the "competitors in these areas were susceptible to Empire's intimidation." (Ibid, emphasis the Court's.) The Court added:

> There is insufficient proof that the competitors of Empire: (a) raised or fixed prices because of Empire's threats; (b) stopped soliciting Empire customers; or (c) decided not to enter the LP business or decided to leave the business on account of defendant's action.

Ibid. Nor was the Court persuaded on the dangerous probability issue by the Govern-

ment's expert economist who testified at the trial on the issue. The Eighth Circuit summarized its ruling on this issue as follows:

> Taking the evidence of dangerous probability of success as a whole, as is proper in an antitrust case...we cannot find the requisite proof. The Government established that: (a) Empire had a large share of the market in Lebanon and Wheaton in 1972: about 50%; (b) it has engaged in anticompetitive conduct in various areas, which has not been shown to have been effective in the Lebanon or Wheaton areas; (c) the price of LP in Lebanon may be slightly higher than in some other areas, but the reasons for this are a matter of speculation; (d) the defendant has had a fairly high rate of profit for the past ten years. We cannot conclude from this inconclusive evidence that there is a dangerous probability that the defendant will be able to monopolize the LP gas business, or exert control over prices or competition in the Lebanon or the Wheaton market areas.

537 F.2d at 307. See also, e.g., Diamond International Corp., supra, similarly

holding that even a 51% share was insufficient in the circumstances of that case. 289 F.Supp. at 578.

Even plaintiffs' economist testified that knowledge of a firm's market share is an insufficient basis for determining that firm's market power. He stated that, besides market share, one needs to know such things as the nature of the products being produced, the ease of entry into the market, and the market shares of other competitors. Plaintiffs offered the court little or no information on competitors' market shares, and their economist made no attempt to gather such information in arriving at his opinions.[7] The evidence with regard to ease of entry contradicts his opinion on market power.

In Empire Gas,[8] supra, even concededly predatory conduct plus a 50% market share (and over 3,000 non-

competition covenants) were found by the Eighth Circuit to be insufficient to establish any real hazard to competition in the relevant market and thus were found to be insufficient to satisfy the dangerous probability test. 537 F.2d at 306-07. See also Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973-75 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969) (holding that "loss leader" sales in that case did not give rise to dangerous probability of monopoly).

In this case, the acts claimed by plaintiffs were not predatory and are nowhere near sufficient to create such a danger of monopoly, not only because of Vendo's declining market position, but more significantly because the acts relied upon - Vendo's acquisitions, its alleged policy concerning non-competition covenants, and the state court suit against

Stoner and Stoner Investments - have not been directed toward or caused any injury to other companies in the vending machine industry. Plaintiffs did not even contend that Vendo ever sought to injure companies such as National Vendors, Automatic Products, and RMI, which have in fact captured large market shares while Vendo's market position has deteriorated. Indeed, plaintiffs concede that Automatic Products was unhindered by Vendo's alleged overt acts. By contrast, in Kearney & Trecker v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971 cert. denied 405 U.S. 1066 (1972),[9] the overt acts, had they been successful, would have led to control of the market.

The primary evidence offered by plaintiffs of Vendo's specific intent to establish monopoly power is the inference that plaintiffs would have this court draw

that Vendo's negotiation and enforcement of the non-competition covenants were overt acts in furtherance of an attempt to monopolize.[10] However, a specific intent to monopolize cannot be inferred from these acts. As the Ninth Circuit held in Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1145 (9th Cir.), cert. denied, 419 U.S. 10232 [sic] (1974): "...the evidence did not disclose that [defendant's] actions were not predominantly motivated by legitimate business objectives. Accordingly, [plaintiffs'] case under Section 2 of the Sherman Act must fail."

Specific intent to monopolize also cannot be inferred from Vendo's acquisitions. There is no evidence that any acquisition was anticompetitive in intent or effect, and given the fact that there was no evidence that Vendo's acquisitions

of Vendorlator and Stoner Manufacturing combined harmed competition or injured other competitors, specific intent to monopolize cannot be inferred from them. Similarly, in United States v. Columbia Steel Co., 334 U.S. 495, 533 (1948), the Supreme Court refused to infer specific intent to monopolize from a large acquisition by U.S. Steel; according to the Court, "... the acquisition of a firm outlet to absorb a portion of Geneva's rolled steel production seems to reflect a normal business purpose rather than a scheme to circumvent the law."

Finally, no specific intent to monopolize can be inferred from Vendo's alleged policy of requiring and enforcing covenants not to compete. The covenants in the employment and acquisition agreements with Stoner and Stoner Investments, as already discussed, were reasonable in

scope and duration as enforced and ancillary to the lawful acquisition and there is no evidence that they had a damaging effect on competition. Furthermore, there is no evidence that other covenants which Vendo obtained or sought to enforce were intended to have or did have a damaging effect on competition or plaintiffs.

There was, in short, no proof of "predatory conduct directed to accomplishing the unlawful purpose" of achieving monopoly power; and without such proof, there can be no § 2 liability. Chisholm Bros. Farm Equipment, supra, 498 F.2d at 1144, quoting Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974).

Taking into account Vendo's "capacity to commit the offense, the scope of its

objective, and the character of its conduct" and more fundamentally its "actual or threatened impact on competition in the relevant market", as Kearney & Trecker requires (452 F.2d at 598), plaintiffs' §2 contention must be rejected.

While at first blush plaintiffs' §7 Clayton Act claim may appear to be meritorious, plaintiffs have failed to establish the adverse market impact of Vendo's acquisition of Stoner Manufacturing.

Contrary to plaintiffs' contention, as this court views the evidence presented, it appears that rather than "substantially lessening competition" the merger in the instant case, if it affected the relevant line of commerce at all, affected it in such a way as to promote competition.

Nevertheless, in establishing a § 7 violation, plaintiffs must demonstrate an

adverse market impact. Plaintiffs have failed to do this. Rather they have profferred [sic] statistics, which, while sufficient to withstand a motion to dismiss, do not establish a substantial lessening of competition.

The fact that Stoner was able to take the money he received from his sale of Stoner Manufacturing and his employment with Vendo and set up Lektro-Vend, a new vending machine manufacturer, which plaintiffs contend could have been a significant competitor, does not satisfy plaintiffs burden that Vendo's acquisition of Stoner Manufacturing substantially lessened competition.

Plaintiffs have not adduced the slightest evidence of any anticompetitive effects of the acquisition. Indeed, the evidence is to the contrary. As plaintiffs admit, Stoner's share of the

national candy vending machine business had dropped from 71% in 1955 to only 31% at the time of the acquisition in 1959. And as the Illinois Supreme Court found, during 1959 to 1969 following the acquisition, Vendo's share of this business declined from 31% to approximately 16%.

Plaintiffs have erred in assuming that even a true horizontal merger can be condemned merely on the basis of statistical evidence of market shares. Such an approach has been repeatedly condemned by the Supreme Court and other federal courts, including the Seventh Circuit.

As the Supreme Court held in Brown Shoe Co. v. United States, 370 U.S. 294, 321-322 (1962), "...Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry," and "...only a further examination of the particular

market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger." 370 U.S. at 322 n.38.

On that basis, in United States v. General Dynamics Corp., 415 U.S. 486 (1974), affirming Judge Robson's dismissal of a Government § 7 action, the Supreme Court held that

> ...the District Court was justified in viewing the statistics relied on by the Government as insufficient to sustain its case. Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete... Thus, companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7, not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor.

* * * *

> Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the District Court and fully substantiated that court's conclusion that its acquisition by Material Service would not 'substantially... lessen competition....'

415 U.S. at 501, 503-504.

Notwithstanding the Government's proof in that case that the merger resulted in a combined market share of nearly 22%, the Supreme Court concluded:

> Irrespective of the markets within which the acquiring and the acquired company might be viewed as competitors for purposes of this § 7 suit, the Government's satistical [sic] presentation simply did not establish that a substantial lessening of competition was likely to occur in any market.

415 U.S. at 511.

Similarly, the following year in United States v. Citizens & Southern National Bank, 422 U.S. 86, 120 (1975), the Supreme Court rejected the Govern-

ment's § 7 claim on the ground that "the market-share statistics gave an inaccurate account of the acquisition's probable effects on competition."

And, in United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977), the Seventh Circuit rejected a similar § 7 attack based on statistical grounds. The combined market shares resulting from the merger were 25% (19% plus 6%) and 34% (27% plus 7%). Nevertheless, relying on General Dynamics, supra, the Court held that "the market share statistics gave an inaccurate account of the acquisition's probable effects on competition" and "that the Government's past market statistics are insufficient to constitute a prima facie case." 564 F.2d at 773-774. See also, e.g., United States v. Tidewater Marine Service, Inc., 284 F.Supp. 324, 343 (E.D.

La. 1968) ("A horizontal merger such as this is not per se a violation of § 7" even though the merging firms were assumed to have a combined market share of 31%); United States v. M.P.M., Inc., 1975-1 Trade Cases ¶ 60,312 (D.Colo.) at pp. 66,242-45 (horizontal merger upheld despite 31.6% combined market share); United States v. Consolidated Foods Corp., 1978-1 Trade Cases ¶ 62,063 (E.D.Pa.)

In the instant case, whether we view the statistics of the "Vendo-served market" or the market as a whole, this court does not find a substantial lessening of competition given the other relevant circumstances. In the period preceding the acquisition, Stoner Manufacturing's sales had been slipping rapidly because of Stoner's serious health problems, Adelberg's death, and the lack of management depth -- factors indicating the

possibility if not the probability of Stoner Manufacturing's falling by the wayside or of losing substantially its competitive position. And since the acquisition Vendo's competitive position has significantly deteriorated.

This court views these changes as being of importance, particularly in light of the Seventh Circuit's comments in International Harvester, 564 F.2d at 773-774, which we find directly applicable to the instant case:

> To the extent that the Government's criticism is aimed instead at the type of evidence used by the district court to overcome this presumption, we disagree. In responding to a statistical showing of concentration and in concluding that Section 7 was not violated, Judge Leighton properly considered evidence of Steiger's 'weakness as a competitor.' United States v. General Dynamics, 415 U.S. 486, 503, 94 S.Ct. 1186, 39 L.Ed.2d 530. In fact, characterized in either one of two ways, this evidence is

precisely the kind of information into which the Supreme Court in recent cases has mandated an inquiry. See United States v. Citizens & Southern National Bank, 422 U.S. 86, 120, 95 S.Ct. 2099, 45 L.Ed.2d 41; United States v. Marine Bankcorporation, supra, at 631, 94 S.Ct. 2856; United States v. General Dynamics, supra, at 497-498, 94 S.Ct. 1186; Brown Shoe Company v. United States, 370 U.S. 294, 322 n.38, 82 S.Ct. 1502, 8 L.Ed.2d 510. First, the evidence can be viewed as showing that "the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." United States v. Citizens & Southern ational Bank, supra, at 120, 95 S.Ct. at 2118, citing United States v. General Dynamics, supra, at 497-98, 94 S.Ct. 1186. This showing, which has been called the "General Dynamics defense," establishes that the Government's past market statistics are really insufficient to constitute a prima facie case because Steiger's weak financial reserves (like United Electric's weak coal reserves in General Dyanmics) would not allow it to be as strong a competitor as the bald statistical projections indicate. Second, the evidence is appropriate to the related proposition that even accepting

the statistics as the primary index of market power, "only a further examination of the particular market - its structure, history and probable future can provide the appropriate setting for judging the probable anticompetitive effect of the merger." Brown Shoe v. United States, supra, at 322 n.38, 82 S.Ct. at 1522, quoted in United States v. General Dyanmics, supra, at 498, 94 S.Ct. 1186. Viewed in this light and focused more directly on the ultimate conclusion, the prima facie case presented by the Government was rebutted by persuasive evidence, including Steiger's weakened financial condition, indicating that "no substantial lessening of competition occurred or was threatened." 415 U.S. at 498, 94 S.Ct. at 1194. Thus even though the defendants do not rely on the failing-company doctrine, which is a valid defense to a Section 7 suit, they have shown that even if Steiger remained in the market, it did not have sufficient resources to compete effectively, and this supports the district court's conclusion that the acquisition of 39 per cent of Steiger's stock by Harvester would not substantially lessen competition. See 415 U.S. at 508, 509-510, 94 S.Ct. 1186.

Despite plaintiffs speculative contentions that Lektro-Vend, absent Vendo's enforcement of the non-competition covenants exacted from Stoner and Stoner Manufacturing, could have become a significant competitor as a manufacturer of vending machines, it is highly doubtful in this court's opinion that Lektro-Vend would have even been established had it not been for the money Stoner obtained from Vendo's acquisition of the failing Stoner Manufacturing and the employment of Stoner.

Plaintiffs assertion that the 1959 acquisition was an illegal product extension merger under § 7 of the Clayton Act also fails.

Plaintiffs ignore the Supreme Court's requirements for establishing an illegal market-extension merger. One of the Court's more recent decisions involving

the potential competition doctrine is United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). In affirming the district court's dismissal of the Government's complaint, the Court explained the elements of proof to be established in a potential competition case, and held that the Government had not met its burden. First, the market involved must be a concentrated one in which "there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services." 418 U.S. at 630. Second, the acquiring company must be the most likely entrant or one of a small number of possible potential entrants. And third, for the perceived potential entrant theory to apply, the company must have had the characteristics,

capabilities and economic incentives to render it a perceived potential de novo entrant and its premerger presence on the fringe of the target market must be shown to have in fact tempered oligopolistic behavior on the part of existing participants in the market. 418 U.S. at 624-25.[11]

The difficulty of meeting these criteria has resulted in almost uniform rejection of potential competition theories in market extension cases subsequent to Marine Bancorporation. See Federal Trade Commission v. Atlantic Richfield Co., 549 F.2d 289, 293-98 (4th Cir. 1977); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 860-66 (2d Cir.), cert. denied, 419 U.S. 833 (1974); BOC International, Ltd. v. Federal Trade Commission, 557 F.2d 24, 26-30 (2d Cir. 1977); United States v. Consolidated

Foods Corp., 1978-1 Trade Cases ¶62,063 (E.D. Pa.); United States v. Hughes Tool Co., 415 F.Supp. 637, 645-46 (C.D. Cal. 1976); United States v. Black & Decker Mfg. Co., 430 F.Supp. 729 (D. Md. 1976); Federal Trade Commission v. Tenneco, Inc., 1977-1 Trade Cases ¶ 61,449 (D.D.C. 1977); United States v. Amax, Inc., 402 F.Supp. 956, 959-60 (D.Conn. 1975); Budd Co., 86 F.T.C. 518 (1974).

In this case, the plaintiffs have made no showing whatever that Vendo's premerger presence on the fringe of the candy vending machine market did in fact temper oligopolistic behavior on the part of existing participants in the market. Instead, without even citing Marine Bancorporation and the other key potential competition cases applying the Marine Bancorporation tests, plaintiffs ask this court to hold the 1959 acquisition illegal

merely on the basis of alleged "striking parallels" to a pre-Marine Bancorporation case, Federal Trade Commission v. Proctor & Gamble Co., 386 U.S. 568 (1967). These alleged "striking parallels" do not in fact exist, and furthermore in Proctor & Gamble the Supreme Court specifically found that it was "clear that the existence of Proctor & Gamble at the edge of the industry exerted considerable influence on the market." 386 U.S. at 581. This finding, specifically reaffirmed as a requirement in Marine Bancorporation, cannot be made in the instant case.

Furthermore, at the time of its acquisition of Clorox, P&G was the largest user of television advertising in the United States, with an advertising and sales promotion budget in excess of $127 million. Clorox was the leading manufacturer of household liquid bleach (with

48.8% of the highly concentrated national liquid bleach market and a significantly higher market share which "approached monopoly proportions in certain areas"), and its market share also had been steadily increasing for the five years prior to the merger. In addition, Clorox was the only bleach manufacturer selling on a national basis. 386 U.S. at 571, 573. One of the principal reasons for Clorox's dominant position was its heavy advertising and sales promotions. For example, in the year of the merger, Clorox had spent more than 10% of its total sales on advertising. 386 U.S. at 572. In addition, the Court observed that substantial advertising advantages would have been available to Clorox through P&G because, at the time, the major television networks offered discounts based on volume advertising and therefore P&G would be able to give each

of its products network exposure at a fraction of the cost per product that a firm with only one product to advertise would have incurred. 386 U.S. at 579.

In the instant case, not only can there be no finding of actual "edge effect" resulting from Vendo's potential competition, but there is no evidence that advertising has ever played a significant role in the sale of vending machines. Unlike the P&G/Clorox merger, the Stoner acquisition has not been shown to raise entry barriers. Indeed, the market position of the combined firm declined after the acquisition took place while the market share of other competitors increased.

In sum, this ocurt concludes that plaintiff has failed to meet its burden of proof on any of the alleged federal antitrust claims.

Accordingly, it is ordered that a judgment be and the same is hereby entered in favor of defendant, Vendo. Consequently, the state court judgments stand.

E N T E R:

_____
Stanley J. Roszkowski, Judge
United States District Court

Dated_____

FOOTNOTES

1. Any finding of fact which may be more properly termed a conclusion of law shall be deemed a conclusion of law.

2. According to Vendo's records, the "Vendo-served market" encompassed all coin-operated vending machines for food, drink, and cigarettes, with the exception of bulk confection venders and a few other inconsequential items.

3. A full-line manufacturer is one that has a line including candy, pastry, snack machines, cigarette machines, coffee machines, cold drink machines, and hot and cold food machines.

4. As of December 31, 1961, Vendo exercised its option and purchased the land and property constituting the Stoner Mfg. plant. The option purchase price was $948,000, less prepayments made under the terms of paragraph (c) of Section 2 of the acquisition agreement. Such prepayments amounted to $301,082.07. Therefore, the balance of the option purchase price amounted to $646,917.93.

5. On October 12, 1962, after differences of opinion had arisen between Stoner and Vendo as to their respective rights and obligations under the sale contract, Vendo and Stoner Investments entered into a compromise agreement. Under the terms of that agreement, Vendo paid Stoner Investments $78,757.02 and was thereby released from its obligation to pay a percentage of income received from foreign

production of the machines it had acquired from Stoner. Vendo was also released from its obligations with respect to the collection of Stoner Mfg.'s accounts receivables.

6. Any conclusion of law which may be more properly termed a finding of fact shall be deemed a finding of fact.

7. Mr. Kamien did not know the market shares of other vending machine manufacturers and admitted having made no effort to determine them. Indeed, he testified that he made no empirical studies of the industry and did not contact any operators, location owners, trade associations, trade journals or other vending machine manufacturers.

Not only are his opinions as to Vendo's dominance and monopoly power based on inadequate knowledge of the industry, but they are also based on theories that have no support in the antitrust laws. Contrary to Kamien's opinion that a company wields monopoly power if it merely has the power to influence price and discourage competition, monopoly power requires the power to control prices and exclude competition. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 390-92 (1956); United States v. Grinnell Corp., 384 U.S. 563, 576 (1966). Following Kamien's own logic, in every market other than that in which there is "perfect competition", there is at least one competitor who has the power to influence price, and thus, according to Kamien's definition of monopoly power, there is at least one competitor who

necessarily wields monopoly power. Furthermore, Kamien postulated that if there are five firms in an industry with the power to influence price, each of those five firms would to a certain degree have monopoly power, as he has used the term.

8. The Eighth Circuit stated that "the record before us establishes that the defendant attempted to use price cuts or threats of price cuts to prevent competitors from soliciting Empire customers." 537 F.2d at 302. In addition, the Court concluded that "... the evidence establishes that many of the defendant's price cuts were designed to give Empire control over the retail prices of LP gas." Ibid., emphasis the Court's.) The Court also stated that ",.,it seems obvious that the defendant wishes to intimidate its competitors into raising their retail prices to the level that Empire thought would insure it a sufficient profit" and "Liberal price cuts reinforced the message" (Ibid.) In this case, by contrast, plaintiffs have not shown any actions of any significance directed toward any of the substantial competitors faced by Vendo.

Plaintiffs also clearly err in asserting that "[n]early any type of activity or practice has been construed as the kind of overt act required to support an attempt to monopolize charge." Indeed, in the absence of monopoly, even statements that claim a right to the market, or statements disparaging competition, are not by themselves evidence of an intent to monopolize. Thus, in Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269, 285 (8th Cir.), cert. denied, 414 U.S. 1022,

1032 (1973), no significance was attached to the statement that the other party "had no right in the walnut shell business. This is my domain." Similarly, in Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971), the statement by an employee that they would drive plaintiff out of business was not enough to show a violation of § 2, in the absence of predatory conduct. See also Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 419 U.S. 1023 (1974); KECO Industries v. Borg-Warner Corp., 334 F.Supp. 1240, 1245-46 (M.D. Pa. 1971), involving disparaging comments about a competitor.

9. Plaintiffs place heavy reliance on Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), cert. denied, 405 U.S. 1066 (1972). Their reliance on that decision is misplaced, for the Seventh Circuit's rationale in that case is directly opposed to plaintiffs' § 2 argument. The Court emphasized that "Plaintiff's actual position in the industry is not... the sole test of violation of § 2" (Id. at 598). Instead, the dangerous probability test:

> ...requires an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of his overt actions. In an antitrust context we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct. The ultimate concern is the firm's actual or

> threatened impact on competition in the relevant market.

452 F.2d at 598.

In the Kearney & Trecker case, the overt acts were obtaining two reissues of a patent by violating a federal statute making it a felony for a federal employee to act as an agent for anyone after having participated in the same matter while employed by the Government; the Court found this to be the "use of predatory means to accomplish its purpose" 452 F.2d at 599. Even though the Court found the plaintiff-counterdefendant's size "impressive" (Id. at 598), the overwhelming consideration was that, had the plaintiff-counterdefendant been successful in its efforts, the result would have been to give it control over the relevant market through its patent position by requiring all competitors to either pay royalties or abandon the production of all machines infringing the broad patent claims. Id. at 598 n.49.

10. Plaintiffs' reliance on decisions such as Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 425 (10th Cir.), cert. denied, 344 U.S. 837 (1952), is plainly misplaced. In that case, it was found that "the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further [Kobe's] existing monopoly and to eliminate Dempsey as a competitor." In addition, the infringement action had been "preceded by a long history of unlawful monopolization." Here, Vendo has never had a monopoly to further and its "real

purpose" was not to eliminate anyone as a competitor but instead to obtain protection for its purchase of Stoner Manufacturing and employment of Stoner and compensation for Stoner's established misconduct. In addition, even if one were to accept arguendo plaintiffs' unfounded argument that the state court suit was directed against Letro-Vend, which was not even a defendant in the state court, it was not by any standard a major competitor and any impact of the suit on Lektro-Vend could not possibly result in Vendo's having a monopoly or a dangerous probability of that result.

11. The Court in Marine Bancorporation did not resolve the question of whether Section 7 of the Clayton Act proscribed a merger solely on the ground that it might eliminate the prospect for future deconcentration that might result if the acquiring firm were forbidden to enter the market other than by de novo entry or a toe-hold acquisition. The Court did hold, however, that if any such "actual potential entrant" theory were to apply, it must be shown -- in addition to the first two elements of proof set forth in the test (i.e., that the target market be characterized by oligopolistic market structure, conduct and performance, and that the acquiring company be the most likely entrant or one of a small number of possible potential entrants) -- not only that the potential competitor had available "feasible means" for entry other than the challenged acquisition, but also that those means offered a substantial likelihood of producing a deconcentration of the target market or "other significant pro-

competitive effects" (418 U.S. at 633). These elements were not established in the Marine Bancorporation case (p. 639), and they have not been established in this case. See also BOC International, Ltd. v. Federal Trade Commission, 557 F.2d 24 (2d Cir. 1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware corporation,	)	
Plaintiffs,	)	
v.	)	No. 65 C 1755
THE VENDO COMPANY, a Missouri corporation,	)	
Defendant.	)	

ORDER

[Entered July 22, 1980]

Judgment is entered in favor of defendant.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VENDO CO. *v.* LEKTRO-VEND CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-156. Argued January 19, 1977—Decided June 29, 1977

Petitioner vending machine manufacturer acquired most of the assets of another vending machine manufacturing company controlled by respondent Stoner and his family. As part of the acquisition agreement the latter company undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines, and respondent Stoner, who was employed by petitioner as a consultant under a five-year contract, agreed not to compete with petitioner in the manufacture of such machines during the term of his contract and for five years thereafter. Subsequently, petitioner sued respondents (Stoner, the company which he and his family controlled, and another corporation with which he had a relationship) in an Illinois state court for breach of the noncompetition covenants. Shortly thereafter, respondents sued petitioner in Federal District Court, alleging that it had violated §§ 1 and 2 of the Sherman Act in that the covenant against competition was an unreasonable restraint of trade. After protracted litigation in the state-court action, the Illinois Supreme Court affirmed a judgment in petitioner's favor in an amount exceeding $7 million. Then in the antitrust action, which, in the meantime, had lain "dormant," the District Court granted respondents' motion for a preliminary injunction against collection of the Illinois judgment, holding that § 16 of the Clayton Act (which authorizes any person to seek injunctive relief against violations of the antitrust laws) constituted an "expressly authorized" exception to the Anti-Injunction Act, 28 U. S. C. § 2283 (which prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"), and further found that an injunction was necessary to protect the court's jurisdiction within the meaning of that exception in § 2283 by preserving a case or controversy, since the state collection efforts would eliminate

Syllabus

the two corporate respondents (which would then be controlled by petitioner) as plaintiffs in the federal suit. The Court of Appeals affirmed, also finding that § 16 of the Clayton Act was an express exception to § 2283, but not reaching the issue of whether an injunction was necessary to protect the District Court's jurisdiction. *Held:* The judgment is reversed and the case is remanded. Pp. 5–18 (opinion of REHNQUIST, J.); pp. 1–3 (opinion of BLACKMUN, J.).

— F. 2d —, reversed and remanded.

MR. JUSTICE REHNQUIST, joined by MR. JUSTICE STEWART and MR. JUSTICE POWELL, concluded that the District Court's preliminary injunction violated the Anti-Injunction Act. Pp. 5–18.

(a) Having been enacted long after the Anti-Injunction Act, § 16 of the Clayton Act, on its face, is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions of that Act. Pp. 6–7.

(b) The test as to whether an Act of Congress qualifies as an "expressly authorized" exception to the Anti-Injunction Act is whether the "Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Mitchum* v. *Foster*, 407 U. S. 225, 238. Here, while the private action conferred by § 16 of the Clayton Act meets the first part of the test in that such an action may be brought only in a federal court, it does not meet the second part of the test, since, as is demonstrated by § 16's legislative history suggesting that § 16 was merely intended to extend to private citizens the right to enjoin antitrust violations, § 16 is not an "Act of Congress [which] could be given its intended scope only by the stay of a state court proceeding." *Mitchum, supra,* distinguished. Pp. 7–10.

(c) To hold that § 16 could be given its "intended scope" only by allowing an injunction against a pending state-court action would completely eviscerate the Anti-Injunction Act, because this would mean that virtually *all* federal statutes authorizing injunctive relief would be exceptions to that Act. While § 16 embodies an important congressional policy favoring private enforcement of the antitrust laws, the importance of the policy to be "protected" by an injunction under § 16 does not control for purposes of the Anti-Injunction Act, since the prohibitions of that Act exist separate and apart from the traditional principles of equity and comity that determine whether or not the state proceeding can be enjoined. Pp. 10–15.

(d) For an Act countenancing a federal injunction to come within the "expressly authorized" exception to the Anti-Injunction Act, it must

necessarily interact with, or focus upon, a state judicial proceeding, and § 16 of the Clayton Act is not such an Act. Pp. 15–16.

(e) The District Court's finding that the injunction was "necessary in aid of its jurisdiction" within the meaning of that exception to the Anti-Injunction Act is supported by neither precedent nor by the factual premises upon which such finding was based. Although such exception may be fairly read as incorporating cases where the federal court has obtained jurisdiction over a *res* prior to the state-court action, here both the federal and state actions are *in personam* actions, which traditionally may proceed concurrently, without interference from either court, and an injunction to "preserve" a case or controversy does not fit within the "necessary in aid of its jurisdiction" exception. It does not appear that even if the two corporate respondents ceased to litigate the federal action, respondent Stoner would lose his standing to vindicate his rights, or that the two corporate defendants would necessarily be removed from the action. Pp. 16–18.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, concluded that, although § 16 of the Clayton Act may be an "expressly authorized" exception to the Anti-Injunction Act in limited circumstances where the state proceedings are part of a "pattern of baseless, repetitive claims" being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, the District Court failed properly to apply the *California Motor Transport* rule because it did not and could not find the state litigation to be part of a "pattern of baseless, repetitive claims" being used in and of itself as an anticompetitive device, and that therefore § 16 did not itself authorize the District Court's injunction. Pp. 1–3.

REHNQUIST, J., announced the Court's judgment and delivered an opinion, in which STEWART and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C. J., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 76-156

Vendo Company, Petitioner,
v.
Lektro-Vend Corporation et al.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1977]

MR. JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART and MR. JUSTICE POWELL join.

I

After nine years of litigation in the Illinois state courts, the Supreme Court of Illinois affirmed a judgment in favor of petitioner and against respondents in the amount of $7,363,500. Shortly afterwards the United States District Court for the Northern District of Illinois enjoined, at the behest of respondents, state proceedings to collect the judgment. The order of the United States District Court was affirmed by the Court of Appeals for the Seventh Circuit, and we granted certiorari to consider the important question of the relationship between state and federal courts which such an injunction raises.

II

The Illinois state court litigation arose out of commercial dealings between petitioner and respondents. In 1959 petitioner Vendo Company, a vending machine manufacturer located in Kansas City, Mo., acquired most of the assets of Stoner Manufacturing, which was thereupon reorganized as respondent Stoner Investment, Inc. Respondent Harry H. Stoner and members of his family owned all of the stock of

Stoner Manufacturing, and that of Stoner Investments. Stoner Manufacturing had engaged in the manufacture of vending machines which dispensed candy, and as a part of the acquisition agreement it undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines. Pursuant to an employment contract, respondent Harry Stoner was employed by petitioner as a consultant for five years at a salary of $50,000, and he agreed that during the term of his contract and for five years thereafter he would not compete with petitioner in the business of manufacturing vending machines.

In 1965, petitioner sued respondents[1] in state court for breach of these noncompetition covenants. Shortly thereafter, respondents sued petitioner in the United States District Court for the Northern District of Illinois, complaining that petitioner had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. Respondents alleged that the covenants against competition were unreasonable restraints of trade because they were not reasonably limited as to time and place, and that the purpose of petitioner's state court lawsuit was to "unlawfully harass" respondents and to "eliminate the competition" of respondents. App. 22, 25.

Respondents set up this federal antitrust claim as an affirmative defense to petitioner's state court suit. App. 31–32. However, prior to any ruling by the state courts on the merits of this defense, respondents voluntarily withdrew it. App. 82.

The state court litigation ran its protracted course,[2] including two trials, two appeals to the State Appellate Court, and

[1] In addition to respondents Stoner and Stoner Manufacturing, petitioner also sued respondent Lektro-Vend Corporation. Lektro-Vend had developed a radically new vending machine, and it was Stoner's relationship with Lektro-Vend that formed the basis of the law suit.

[2] The Court of Appeals' summary of the state court litigation is illustrative:

"The suit was filed in Kane County, Illinois on August 10, 1965; the

an appeal to the Supreme Court of Illinois. In September 1974, the latter court affirmed a judgment in favor of petitioner and against respondents in an amount exceeding seven million dollars. *Vendo Co.* v. *Stoner*, 58 Ill. 2d 289, 321 N. E. 2d 1 (1974). The Supreme Court of Illinois predicated its judgment on its holding that Stoner had breached a fiduciary duty owed to petitioner, rather than upon any breach of the noncompetitive covenants.[3] This Court denied respondents' petition for a writ of certiorari. 420 U. S. 975 (1975).

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complaint charged breach of noncompetition covenants; an amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for $250,000 and against both defendants for $1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

"An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969, 105 Ill. App. 2d 261. The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court also held that though the trial court erred in striking the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

"Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled $7,363,500.

"Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, 13 Ill. App. 3d 291, that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

"Upon appeal to the Illinois Supreme Court on September 27, 1974, 58 Ill. 2d 289, the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery—the breach of a fiduciary obligation on the part of Stoner—then had been asserted by Vendo." *Lektro-Vend Corp.* v. *Vendo Co.*, 545 F. 2d 1050, 1054–1055, n. 4 (CA7 1976).

[3] "Quite apart from any liability which may be predicated upon a breach

During the entire nine-year course of the state court litigation, respondents' antitrust suit in the District Court was, in the words of the Court of Appeals, allowed to lie "dormant." 545 F. 2d 1050, 1055 (CA7 1976). But the day after a Circuit Justice of this Court had denied a stay of execution pending petition for certiorari to the Supreme Court of Illinois, respondents moved in the District Court for a preliminary injunction against collection of the Illinois judgment. The District Court in due course granted this motion. *Lektro-Vend Corp.* v. *Vendo Company*, 403 F. Supp. 527 (ND Ill. 1975). That court found that it "appear[ed] that the non-competition covenants were overly broad," *id.*, at 533, and that there was "persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately." *Id.*, at 534–535. Recognizing that there is a "paucity of authority" on the issue, *id.*, at 536, the District Court held that the injunctive relief provision of the Clayton Act, 15 U. S. C. § 26, constitutes an express exception to 28 U. S. C. § 2283, the "Anti-Injunction Act." The court further found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to § 2283.

The Court of Appeals affirmed, finding that § 16 of the Clayton Act was an express exception to 28 U. S. C. § 2283. The court did not reach the issue of whether injunction was necessary to protect the jurisdiction of the District Court.

In this Court, petitioner renews its contention that principles of equity, comity, and federalism, as well as the Anti-Injunction Act, barred the issuance of the injunction by the

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of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and officer of plaintiff." 58 Ill. 2d, at 303, 321 N. E. 2d, at 9.

District Court. Petitioner also asserts in its brief on the merits that the United States District Court was required to give full faith and credit to the judgment entered by the Illinois courts.[4] Because we agree with petitioner that the District Court's order violated the Anti-Injunction Act, we reach none of its other contentions.

III

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The origins and development of the present Act, and of the statutes which preceded it, have been amply described in our prior opinions and need not be restated here. The most recent of these opinions are *Mitchum* v. *Foster*, 408 U. S. 225 (1972), and *Atlantic Coastline R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970). Suffice it to say that the Act is an absolute prohibition against any injunction of any state court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 9 (1940). Respondents' principal contention is that, as the Court of Appeals held, § 16 of the Clayton Act, which authorizes a private action to redress violations of the antitrust laws, comes within the "expressly authorized" exception to § 2283.

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[4] This issue was not presented to this Court in the petition for certiorari, and the Court of Appeals did not discuss it in its opinion.

We test this proposition mindful of our admonition that:

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R. Co., supra,* at 297.

This cautious approach is mandated by the "explicit wording of Section 2283" and the "fundamental principle of a dual system of courts." *Ibid.* We have no occasion to construe the section more broadly:

> ". . . [it is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U. S. 511, 514 (1955).

Our inquiry of course begins with the language of § 16 of the Clayton Act, which is the statute claimed to "expressly authorize" the injunction issued here. It provides, in pertinent part:

> "Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss damage is granted by courts of equity, under the rules governing such proceedings. . . ."

On its face, the language merely authorizes private injunctive relief for antitrust violations. Not only does the statute not mention § 2283 or the enjoining of state court proceedings, but the granting of injunctive relief under § 16 is by the terms of that section limited to "the same conditions and principles" employed by courts of equity, and by "the rules governing such proceedings. . . ." In 1793 the predecessor to § 2283 was enacted specifically to limit the general equity powers of

a federal court. *Smith* v. *Apple*, 264 U. S. 274, 279 (1924); *Toucey* v. *N. Y. Life Insurance*, 314 U. S. 118, 130 n. 2 (1941). When § 16 was enacted in 1914 the bar of the Anti-Injunction Act had long constrained the equitable power of federal courts to issue injunctions. Thus, on its face, § 16 is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions of the Anti-Injunction Act with restrictive language not found, for example, in 42 U. S. C. § 1983. See discussion of *Mitchum* v. *Foster*, *infra*.

Respondents rely, as did the Court of Appeals and the District Court, on the following language from *Mitchum:*

> "... [I]t is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. *The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity could be given its intended scope only by the stay of a state court proceeding.*" 407 U. S. 225, 237–238 (1971). (Emphasis added.)

But we think it is clear that neither this language from *Mitchum* nor *Mitchum's ratio decidendi* supports the result contended for by respondents.

The private action for damages conferred by the Clayton Act is a "'uniquely federal right or remedy," in that actions based upon it may be brought only in the federal courts. See *General Investment Company* v. *Lake Shore & Mich. So. R. Co.*, 260 U. S. 245, 287 (1922). It thus meets the first part

of the test laid down in the quoted language from *Mitchum*.

But that authorization for private actions does not meet the second part of the *Mitchum* test; it is not an "Act of Congress [which] could be given its intended scope only by the stay of a state court proceeding," *id.*, at 238. Crucial to our determination in *Mitchum* that 42 U. S. C. § 1983 fulfilled this requirement—but wholly lacking here—was our recognition that one of the clear congressional concerns underlying the enactment of § 1983 was the possiblity that state courts, as well as other branches of state government, might be used as instruments to deny citizens their rights under the federal constitution. This determination was based on our review of the legislative history of § 1983; similar review of the legislative history underlying § 16 demonstrates that that section does not meet this aspect of the *Mitchum* test.

Section 1983 on its face, of course, contains no reference to § 2283, nor does it expressly authorize injunctions against state court proceedings. But, as *Mitchum* recognized, such language need not invariably be present in order for a statute to come within the "expressly authorized" exception if there exists sufficient evidence in the legislative history demonstrating that Congress recognized and intended the statute to authorize injunction of state court proceedings. In Part IV of our opinion in *Mitchum* we examined *in extenso* the purpose and legislative history underlying § 1983, originally § 1 of the Civil Rights Act of 1871. We recounted in detail that statute's history which made it abundantly clear that by its enactment Congress demonstrated its direct and explicit concern to make available the federal courts to protect civil rights against unconstitutional actions of state courts.

We summarized our conclusion in these words:

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned

> that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum, supra,* at 242.

Thus, in *Mitchum,* absence of express language authorization for enjoining state court proceedings in § 1983 actions was cured by the presence of relevant legislative history. In this case, however, neither the respondents nor the courts below have called to our attention any similar legislative history in connection with the enactment of § 16 of the Clayton Act. It is not suggested that Congress was concerned with the possibility that state court proceedings would be used to violate the Sherman or Clayton Acts. Indeed, it seems safe to say that of the many and varied anticompetitive schemes which § 16 was intended to combat, Congress in no way focused upon a scheme using litigation in the state courts. The relevant legislative history of § 16 simply suggests that in enacting § 16 Congress was interested in extending the right to enjoin antitrust violations to private citizens.[5]

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[5] Prior to the enactment of § 16, private injunctive relief was not authorized for antitrust violations. *Paine Lumber Co.* v. *Neal,* 244 U. S. 459 (1917). As far as the legislative history indicates, the sole purpose of § 16 (§ 14 in the original drafts) was to extend to private parties the right to sue for injunctive relief. The following passage, taken in its entirety from H. R. Rep. No. 627, at 21, demonstrates what Congress had in mind in enacting § 16:

"Section 14 authorizes a person, firm, or corporation or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the

The critical aspects of the legislative history recounted in *Mitchum* which led us to conclude that § 1983 was within the "expressly authorized" exception to § 2283 are wholly absent from the relevant history of § 16 of the Clayton Act. This void is not filled by other evidence of congressional authorization.

Section 16 undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement.[8] However, contrary to certain language in the opinion

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existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies."

See also S. Rep. No. 698, at 17–18.

[8] In *California Motor Transportation Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), this Court held that harassing and sham state-court proceedings of a repetitive nature could be part of an anticompetitive scheme or conspiracy. In *Otter Tail Power Co.* v. *United States*, 410 U. S. 366 (1973), one of the allegations was that the federal court defendant had instituted and supported state court litigation for anticompetitive purposes in violation of the antitrust laws. The District Court had enjoined the defendant from "instituting, supporting, or engaging in litigation, directly or indirectly against cities and town, and officials thereof, which have voted to establish municiple power systems. . . ." Jurisdictional Statement, at A–115. This Court vacated and remanded to the District Court for consideration, in light of the intervening decision of *California Motor Transport*, of whether the state court litigation came within the "mere sham" exception announced in *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U. S. 127 (1961). Those cases together may be cited for the proposition that repetitive, sham litigation in state courts may constitute an antitrust violation and that an injunction may lie to enjoin future state court litigation. However, neither of those cases involved the injunction of a pending state-court proceeding, and thus the bar of § 2283 was not brought into play.

of the District Court, 403 F. Supp., at 536, the importance of the federal policy to be "protected" by the injunction is not the focus of the inquiry. Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered by the granting of an injunction against a pending state court action. If we were to accept respondents' contention that § 16 could be given its "intended scope" only by allowing such injunctions, then § 2283 would be completely eviscerated since the ultimate logic of this position can mean no less than that virtually *all* federal authorizing injunctive relief statutes[7] are exceptions to § 2283. Cer-

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Nothing that we say today cuts back in any way on the holdings of these two cases; what we must here decide is whether such a lawsuit may be enjoined by a federal court *after* it has been commenced, notwithstanding the bar of the Anti-Injunction Act. While we conclude that it may not, nothing in our opinion today prevents a federal court in the proper exercise of its jurisdiction to enjoin the commencement of additional state court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws. With respect to this future litigation, the injunction will prevent even the commencement of a second such action, and the principles of federalism do not require the bar of § 2283. This distinction is totally consistent with the realization that the true bona fides of the initial state-court litigation is often not apparent:

"One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *California Motor Transport, supra*, 404 U. S., at 513.

Any "disadvantage" to which the federal plaintiff is put in the initial proceeding is diminished by his ability to set up the federal antitrust claim as an affirmative defense, reviewable by this Court under 28 U. S. C. § 1257 (3), and his ability to sue for treble damages resulting from the vexatious prosecution of that state-court litigation.

[7] Petitioner has catalogued the following federal statutes, and suggests that each woud be so affected:

"E. g., 7 U. S. C. § 216 (§ 315 of the Packers and Stockyards Act of 1921); 7 U. S. C. § 2050a (Farm Labor Contractor Registration Act);

tainly all federal injunctive statutes are enacted to provide for the suspension of activities antithetical to the federal policies underlying the injunctive statute or related statutes. If the injunction would issue under the general rules of equity practice—requiring, *inter alia*, a showing of irreparable injury—but for the bar of § 2283, then clearly § 2283 in some sense may be viewed as frustrating or restricting federal policy since the activity inconsistent with the federal policy may not be enjoined because of § 2283's bar.[8] Thus, were we to accede

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7 U. S. C. § 2305 (a) (§ 6 of the Agricutural Fair Practices Act of 1967); 12 U. S. C. § 1731b (i) (§ 513 of the National Housing Act); 12 U. S. C. § 1976 (Bank Holding Company Act); 15 U. S. C. § 78aa (Securities Exchange Act); 15 U. S. C. § 298 (relating to the false stamping of gold and silver); 15 U. S. C. § 433 (providing for suits by farmers' cooperative associations against discrimination by boards of trade); 15 U. S. C. §§ 1114 (2), 1116, 1121 (providing for injunctive relief against trademark infringement); 15 U. S. C. § 2073 (Consumer Product Safety Act); 15 U. S. C. § 2102 (Hobby Protection Act); 17 U. S. C. § 112 (providing for injunctions against violation of any right secured by the copyright laws); 26 U. S. C. § 9011 (b) (Presidential Election Campaign Fund Act); 29 U. S. C. § 412 (Labor-Management Reporting and Disclosure Act); 42 U. S. C. § 2000e–5 (Title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964); 42 U. S. C. §§ 6305, 6395 (e) (Energy Policy and Conservation Act); 45 U. S. C. § 547 (Title III of the Rail Passenger Service Act of 1970); 49 U. S. C. §§ 1 (20), 322 (b)(2), 916, 1017 (b) (Interstate Commerce Act); 49 U. S. C. § 1487 (a) (Federal Aviation Act). See also 16 U. S. C. § 1540 (g) (Endangered Species Act of 1973); 33 U. S. C. § 1365 (Federal Water Pollution Control Act); 33 U. S. C. § 1415 (g) (Marine Protection Research and Sanctuaries Act of 1972); 33 U. S. C. § 1515 (Deepwater Ports Act of 1974); 42 U. S. C. § 300j–8 (Safe Drinking Water Act); 42 U. S. C. § 1857h–2 (Clean Air Act); 42 U. S. C. § 4911 (Noise Control Act of 1972)." Petitioner's Reply Brief, pp. 10–11, n. 7.

[8] MR. JUSTICE STEVENS in his dissent, see, *i. e.*, *post*, at 7–9, would conclude that since certain types of state-court litigation may violate the antitrust laws, an injunction of such litigation while pending is "expressly authorized" under the provisions of the Anti-Injunction Act. But this conclusion does not at all follow from the premise that judicial decisions

to respondent's interpretation of the "intended scope" language, an exception to § 2283 would always be found to be "necessary" to give the injunctive act its full intended scope,

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have construed the prohibition of the antitrust laws to include sham and frivolous state-court proceedings—a premise with which we do not at all disagree, see *supra*, n. 6. The conclusion is supportable only as a matter of policy preference, and not of statutory construction. Under MR. JUSTICE STEVENS' view, all a federal court need do is find a violation of the federal statute, then by the very force of that finding "express authorization" for the statute would be presumed. But this approach flies in the face of our past decisions. For example, in *Mitchum, supra*, the petitioner had alleged that the state courts "were depriving him of rights protected by the First and Fourteenth Amendment." 407 U. S., at 227. Under MR. JUSTICE STEVENS' syllogistic formulation, since the state-court action is a violation of § 1983, the express authorization would be readily found on the face of the statute. However, the Court in *Mitchum* found no such *ipso facto* shortcut to the explicit prohibition of § 2283, but resorted to careful analysis of the legislative history in order to find evidence of congressional authorization. In short, MR. JUSTICE STEVENS' approach, which removes the bar of § 2283 from all federal injunctive statutes, is totally inconsistent with this Court's longstanding recognition that "[l]egislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers, supra*, at 514.

In reaching this conclusion, MR. JUSTICE STEVENS argues that the Anti-Injunction Act should be "considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation." *Post*, at 15. But this view is inconsistent with the approach adopted by the Court in *Amalgamated Clothing Workers, supra*. In that case, an employer had sought an injunction against a union in state court. This Court found that the action before the state court was "outside state authority," 348 U. S., at 514, and that jurisdiction was vested solely in the National Labor Relations Board. But the Court found that the exclusive federal jurisdiction was not sufficient to render § 2283 inapplicable. See also *Atlantic Coastline R. Co., supra*.

We think MR. JUSTICE STEVENS' view tends to confuse the jurisdiction granted to federal courts by § 16 of the Clayton Act with the separate question of whether a court having such jurisdiction has also been "expressly authorized" to enjoin state-court proceedings. *Post*, at 6–7. But

and § 2283 would place no additional limitation on the right to enjoin state proceedings. The Anti-Injunction Act, a fixture in federal law since 1793, would then be a virtual dead letter whenever the plaintiff seeks an injunction under a federal injunctive statute. Whether or not the state proceeding could be enjoined would rest solely upon the traditional principles of equity and comity. However, as we emphasized in *Mitchum*, 407 U. S., at 243, the prohibitions of § 2283 exist separate and apart from these traditional principles, and we cannot read the "intended scope" language as rendering this specific and longstanding statutory provision inoperative simply because important federal policies are fostered by the statute under which the injunction is sought. Congress itself has found that these policies, in the ordinary case, must give way to the policies underlying § 2283. Given the clear prohibition of § 2283, the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying § 2283; by its statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself.[9]

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the question of whether an injunction against state-court proceedings has been "expressly authorized" under § 2283 never arises unless the federal court asked to issue the injunction has subject matter jurisdiction of the case in which the injunction is sought. Here the District Court is entirely free to proceed with the litigation on the merits of respondents' antitrust claim against petitioner, and to grant damages and such other relief as may be appropriate if it determines the issues in favor of respondents. All that we conclude is that it may not include as a part of that relief an injunction against an already pending state-court proceeding.

[9] Much of MR. JUSTICE STEVENS' dissenting opinion is an able brief for th conceded importance of the Sherman and Clayton Acts. But however persuasive it might be in inducing Congress to lift the bar of § 2283 with respect to injunctions issued under § 16, we do not believe it is persuasive in determining whether, under the present state of the law, Congress has in fact "expressly authorized" the injunction issued by the District Court here. For example, MR. JUSTICE STEVENS laments that state-

Our conclusion that the "importance," or the potential restriction in scope, of the federal injunction statute does not control for § 2283 purposes is consistent with the analysis of those very few statutes which we have in the past held to be exceptions to the Anti-Injunction Act. See *Mitchum, supra,* 234–235, and nn. 12–16. The original version of the Anti-Injunction Act itself was amended in 1874 to allow federal courts to enjoin state court proceedings which interfere with the administration of a federal bankruptcy proceeding. Rev. Stat. § 720 (1874). The Interpleader Act of 1926, 28 U. S. C. § 2361, the Frazier-Lempke Act, 11 U. S. C. § 203, and the Federal Habeas Corpus Act, 28 U. S. C. § 2251, while not directly referring to § 2283, have nonetheless explicitly authorized injunctive relief against state court proceedings. The Act of 1851 limiting liability to ship owners, 45 U. S. C. § 185, provided that, after deposit for certain funds in the court by the ship owner, "all claims and proceedings against the owner with respect to the matter in question shall cease." The stat-

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court proceedings may now become the vehicles by which an antitrust violator may put one independent businessman after another out of business. See *post,* at 8–9. Federal courts are able to enjoin future repetitive litigation, see discussion of *California Motor Transport* and *Otter Tail Power,* n. 6, *supra.* But even if one were to agree with this broad speculation, the solution is simple and straightforward. If Congress determines that the use of state-court proceedings to foster anticompetitive schemes is of sufficient gravity, it may simply conclude that the need for greater antitrust enforcement outweighs the need to prevent friction in our federal system and amend § 16 to expressly authorize an injunction of state-court proceedings.

No desire for more vigorous antitrust enforcement should cause us to lose sight of our role as judges in interpreting explicit command of a congressional statute; for notwithstanding the rhetoric of the dissenting opinion, the conclusion that §16 is an "expressly authorized" exception to § 2283 is no more than an *ipse dixit.* The "explicit wording of Section 2283," *Atlantic Coast Line R. Co., supra,* at 297, is lost on the dissent; the dissent's approach is the clearest form of judicial improvisation which the Court counseled against in *Amalgamated Clothing Workers of America* v. *Richman Bros., supra,* at 514.

utory procedures for removal of a case from state court to federal court provide that the removal acts as a stay of the state court proceedings. 28 U. S. C. § 1446 (e).

By limiting the statutory exceptions to § 2283 and its predecessors to these few instances, we have clearly recognized that the act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding.[10] Section 16 of the Clayton Act, which does not by its very essence contemplate or envision any necessary interaction with state judicial proceedings, is clearly not such an act.

IV

Although the Court of Appeals did not reach the issue, the District Court found that, in addition to being "expressly authorized," the injunction was "necessary in aid of its jurisdiction," a separate exception to § 2283. The rationale of the District Court was as follows:

> "The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court." 403 F. Supp., at 536–537.

In *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118, 134–135 (1945), we acknowledged the existence of a

[10] A possible exception is *Porter* v. *Dicken*, 328 U. S. 252, regarding § 205 (a) of the Emergency Price Control Act of 1942. This Act, enacted in response to war-time exigencies, expired in 1947.

historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over *res*, prior to the state court action. Although the "necessary in aid of" exception to § 2283 may be fairly read as incorporating this historical *in rem* exception, see C. Wright, Law of Federal Courts, ¶ 47, at 204 (3d ed.), the federal and state actions here are simply *in personam*. The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922):

> ". . . [a]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . . ." *Id.*, at 230 (emphasis added).

No case of this Court has ever held that an injunction to "preserve" a case or controversy fits within the "necessary in aid of its jurisdiction" exception; neither have the parties directed us to any other federal court decisions so holding.

The District Court's legal conclusion is not only unsupported by precedent, but the factual premises upon which it rests are not persuasive. First, even if the two corporate plaintiffs would cease to litigate the case after execution of the state court judgment, there is no indication that Harry Stoner himself would lose his standing to vindicate his rights, or that the case could not go forward. Nor does it appear that

two corporate plaintiffs would necessarily be removed from the lawsuit. As far as the record indicates, there are currently minority shareholders in those corporations whose ownership interests would not be affected by petitioner's acquisition of majority stock control of the corporations. Under the applicable rules for shareholder derivative actions, see Fed. Rule Civ. Proc. 23.1, the shareholders could presumably pursue the corporate rights of action, which would inure to their benefit, even if the corporations themselves chose not to do so. Finally, petitioner offered to enter a consent decree which assuredly would eliminate any possibility of petitioners acquiring control of the corporation. See App. 209, 258. The injunction in this case was therefore even under the District Courts' legal theory not *necessary* in aid of that court's jurisdiction.

Our conclusion that neither of the bases relied upon by the District Court constitutes an exception to § 2283 is more than consistent with the recognition that any doubt must be resolved *against* the finding of an exception to § 2283, *Atlantic Coast Line R. Co., supra*, at 297; a holding that there is an exception present in this case would demonstrably involve "judicial improvisation." *Amalgamated Clothing Workers, supra*, at 514.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 76-156

Vendo Company, Petitioner, v. Lektro-Vend Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1977]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

Although I agree that the decision of the Court of Appeals should be reversed, I do so for reasons that differ significantly from those expressed by the plurality. According to the plurality's analysis, § 16 of the Clayton Act, 15 U. S. C. § 26, is not an expressly authorized exception to the Anti-Injunction Act, 28 U. S. C. § 2283, because it is not "an 'Act of Congress [which] could be given its intended scope only by the stay of a state court proceeding,' [*Mitchum* v. *Foster*, 407 U. S. 225, 238 (1972)]." *Ante*, at 9. I do not agree that this is invariably the case; since I am of the opinion, however, that the state-court proceeding in this case should not have been enjoined by the federal court, I concur in the result.

In my opinion, application of the *Mitchum* test for deciding whether a statute is an "expressly authorized" exception to the Anti-Injunction Act shows that § 16 is such an exception under narrowly limited circumstances. Nevertheless, consistently with the decision in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972),* I would hold

*I cannot agree with MR. JUSTICE STEVENS that the examples given in the quoted portion of *California Motor Transport Co.* v. *Trucking Unlimited*, *post*, necessarily involve the use of the adjudicatory process in the same way that the state courts were being used in this case. For example, there is no reason to believe that the Court's reference to the use of a patent obtained by fraud to exclude a competitor contemplated

that no injunction may issue against currently pending state-court proceedings unless those proceedings are themselves part of a "pattern of baseless, repetitive claims" that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings. Cf. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S., at 513. See also *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 380 (1973).

In my view, the District Court failed properly to apply the *California Motor Transport* rule. The court believed that it was enough that Vendo's activities in the single state-court proceeding involved in this case were not genuine attempts to use the state adjudicative process legitimately. In reaching this conclusion, the court looked to Vendo's purpose in con-

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only one lawsuit. The case cited in connection with that reference, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965), held only that the enforcement of a patent procured by fraud on the Patent Office could state a claim under § 2 of the Sherman Act, where the monopolistic acts alleged included use of the fraudulent patent through a course of action involving both threats of suit and prosecution of an infringement suit.

MR. JUSTICE STEVENS' quote from *California Motor Transport* stops just short of the language that I consider critical to the instant case: The Court's opinion continues:

". . . Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw." 404 U. S., at 513.

Since I believe that federal courts should be hesitant indeed to enjoin on-going state-court proceedings, I am of the opinion that a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case.

ducting the state litigation and to several negative effects that the litigation had upon respondent. The court, however, did not find a "pattern of baseless, repetitive claims," nor could it have done so under the circumstances. Only one state-court proceeding was involved in this case, and it resulted in the considered affirmance by the Illinois Supreme Court of a judgment for more than $7 million. In my opinion, therefore, it cannot be said on this record that Vendo was using the state-court proceeding as an anticompetitive device in and of itself. Thus, I believe that § 16 itself did not authorize the injunction below, and on this ground, I would reverse.

SUPREME COURT OF THE UNITED STATES

No. 76-156

Vendo Company, Petitioner, v. Lektro-Vend Corporation et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 29, 1977]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

Quite properly, the plurality does not question the merits of the preliminary injunction entered by the United States District Court for the Northern District of Illinois staying proceedings in the Illinois courts. It was predicated on appropriate findings of fact,[1] it was entered by a district judge whose understanding of the federal antitrust laws was unique,[2] and its entry was affirmed unanimously by the Court of Appeals.

Judge McLaren found substantial evidence that petitioner intended to monopolize the relevant market; that one of the overt acts performed in furtherance thereof was the use of litigation as a method of harassing and eliminating competi-

[1] Specific findings of likelihood of ultimate success on the merits, likelihood of irreparable harm, a balance of the equities in favor of respondent-movant, and of protection of the public interest by issuance of the injunction are recited and substantiated in the District Court opinion. 403 F. Supp. 527, 532-538 (ND Ill. 1975). The Court of Appeals affirmed, specifically rejecting petitioner's attack on the finding of a likelihood of ultimate success on the merits. 545 F. 2d 1050, 1058-1059 (CA7 1976).

[2] The late Richard W. McLaren served as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice from 1969 until his appointment to the bench in 1972. In private practice he had acted as Chairman of the Antitrust Section of the American Bar Association.

tion; that two of the corporate plaintiffs in the case, respondents here, would be eliminated by collection of the Illinois judgment; and that the state litigation had already severely hampered, and collection of the judgment would prevent, the marketing of a promising, newly developed machine which would compete with petitioner's products. 403 F. Supp. 527, 534–535, 538 (ND Ill. 1975).[3] The Court of Appeals implicitly endorsed these findings when it noted that "[h]ere Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violtions." 545 F. 2d 1050, 1057 (CA7 1976).

The question which is therefore presented is whether the anti-injunction statute[4] deprives the federal courts of power to stay state court litigation which is being prosecuted in direct violation of the Sherman Act. I cannot believe that any of the members of Congress who unanimously enacted

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[3] It is well settled, and the District Court so held, that when the precise conduct proscribed by the antitrust laws is sought to be furthered by litigation, the antitrust laws forbid a court from giving judgment if to do so "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." Citing *Continental Wallpaper Co.* v. *Lewis Voight & Sons*, 212 U. S. 227, 261. *Kelly* v. *Kosuga*, 358 U. S. 516, 520. See *Response of Carolina* v. *Leasco Response, Inc.*, 498 F. 2d 314, 317–320 (CA5 1974), cert. denied, 419 U. S. 1050; *Milsen Company* v. *Southland Corp.*, 454 F. 2d 363 (CA7 1971); *Hilfenbein* v. *International Industries, Inc.*, 438 F. 2d 1068, 1071 (CA3 1971); *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 307 F. 2d 207 (CA3 1962); *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F. 2d 766 (CA6 1960); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (SDNY 1955).

[4] "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

that basic charter of economic freedom [5] in 1890 would have answered that question the way the plurality does today.

I

The plurality relies on the present form of a provision of the Judiciary Act of 1793.[6] In the ensuing century, there were changes in our economy which persuaded the Congress that the state courts could not adequately deal with contracts in restraint of trade that affected commerce in more than one jurisdiction.[7] The Sherman Act was enacted unanimously

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[5] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4.

"The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359–360.

[6] Act of March 2, 1793, § 5, 1 Stat. 335: "nor shall a writ of injunction be granted to stay proceedings in any court of a state; . . ." For convenience, the plurality has referred to this clause as the "Anti-Injunction Act"; that, however, is not the proper name of the statute.

[7] In his first speech in support of his bill, Senator Sherman stated:

"The power of the State courts has been repeatedly exercised to set aside such combinations, as I shall hereafter show, but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.

. . . . .

in 1890 to protect the national economy from the pernicious effects of regulation by private cartel and to vest the federal

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". . . The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.

. . . . . .

". . . The committee therefore deemed it proper by express legislation to confer on the circuit courts of the United States original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, with authority to issue all remedial process or writs proper and necessary to enforce its provisions . . . ." 21 Cong. Rec. 2456 (1890).

Later the same day he said:

". . . [Congress] may 'regulate commerce;' can it not protect commerce, nullify contracts that restrain commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce?

. . . . . .

". . . [The power of the 'combinations'] for mischief will be greatly crippled by this bill. Their present plan of organization was adopted only to evade the jurisdiction of State courts.

. . . . . .

"Suppose one of these combinations should unite all, or nearly all, the domestic producers of an article of prime necessity with a view to prevent competition and to keep the price up to the foreign cost and duty added, would not this be in restraint of trade and commerce and affect injuriously the operation of our revenue laws? Can Congress prescribe no remedy except to repeal it[s] taxes? Surely it may authorize the executive authorities to appeal to the courts of the United States for such a remedy, as courts habitually apply in the States for the forfeiture of charters thus abused and the punishment of officers who practice such wrongs to the public. It may also give to our citizens the right to sue for such damages as they have suffered." 21 Cong. Rec. 2462 (1890).

Senator Sherman, three days later, discussing the rise of the "combinations" during the preceding twenty years:

". . . The State courts have attempted to wrestle with this difficulty. I produced decisions of the supreme courts of several of the States.

"Take the State of New York, where the sugar trust was composed of seventeen corporations. What remedy had the people of New York

courts with jurisdiction adequate to "exert such remedies as would fully accomplish the purposes intended." [8]

Between 1890 and 1914, although private litigants could

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in the suit that they had against that combination? None whatever, except as against one corporation out of the seventeen. No proceeding could be instituted in the State of New York by which all those corporations could be brought in one suit under the common jurisdictions of the United States. No remedy could be extended by the courts, although they were eager and earnest in search of a remedy.

. . . . . .

". . . When a man is injured by an unlawful combination why should he not have the power to sue in the courts of the United States? It would not answer to send him to a State court. It would not answer at all to send him to a court of limited jurisdiction. Then, besides, it is a court of the United States alone that has jurisdiction over all parts of the United States. The United States can send its writs into every part of a State and make parties in different States submit to its process. The States can not do that." 21 Cong. Rec. 2568–2569 (1890).

Similarly, in the House debate Congressman Culberson, floor sponsor of the bill, had this to say during his introductory remarks:

"If Congress will legislate within its sphere and to the limit to which it may go, and if the legislatures of the several States will do their duty and supplement that legislation, the trusts and combinations which are devouring the substance of the people of the country may be effectually suppressed. The States are powerless unless Congress will take charge of the trade between the States and make unlawful traffic that operates in restraint of trade and which promotes and encourages monopoly." 21 Cong. Rec. 4091 (1890). See Letwin, Congress and the Sherman Antitrust Law 1887–1890, 23 U. Chi. L. Rev. 221 (1952).

[8] ". . . [F]ounded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions. . . . [T]he statute in express terms vested the Circuit Court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and

recover treble damages, only the United States could invoke the jurisdiction of the federal courts to prevent and restrain violations of the Sherman Act.[9] When Congress authorized the federal courts to grant injunctive relief in private antitrust litigation, it conferred the same broad powers that the courts possess in cases brought by the Government.[10] Section 16 of the Clayton Act expressly authorizes injunctions against "a violation of the antitrust laws." [11]

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to exert such remedies as would fully accomplish the purposes intended." *Wilder Manufacturing Co.* v. *Corn Products, Co.*, 236 U. S. 165, 174. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 343–347, 349–350. (Opinion of Harlan, J.).

[9] Section 4 of the Sherman Act authorized equitable relief in actions brought by United States Attorneys; § 7 authorized any person injured in his business or property by reason of a violation of the antitrust laws to recover treble damages. 26 Stat. 209–210. In both sections, as is true of § 16 of the Clayton Act, the scope of the court's jurisdiction is limited only by the need to establish a violation of the Act.

[10] Although the kind of relief which is appropriate in private litigation may sometimes be different from that which the Government may obtain, cf. *United States* v. *Borden Co.*, 347 U. S. 514, 518–520, there is no difference in the scope of the jurisdictional grant to the federal court in the two kinds of cases:

". . . [T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind, . . . Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' [*Hecht Co.* v. *Bowles*, 321 U. S. 321,] at 330." *Zenith Corp.* v. *Hazeltine*, 395 U. S. 100, 130–131.

[11] Section 16 provides:

"Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . ." 15

The scope of the jurisdictional grant is just as broad as the definition of a violation of the antitrust laws. That definition was deliberately phrased in general language to be sure that "every conceivable act which could possibly come within the spirit or purpose of the prohibition" would be covered by the statute, regardless of whether or not the particular form of restraint was actually foreseen by Congress.[12] In the

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U. S. C. § 26; 38 Stat. 737. The legislative history of § 16 is thin. In addition to the nearly identical House and Senate reports, *ante*, at 9 n. 5, the following comments from the House debate provide some idea of the congressional intent. Congressman McGillicuddy, a member of the Commerce Committee, described the perceived need:

"Under the present law any person injured in his business or property by acts in violation of the Sherman Antitrust law may recover his damages. . . . There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing relief against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy." 51 Cong. Rec. 9261 (1914).

During consideration of the Conference Report Congressman Floyd described the scope of the § 16 remedy:

". . . so that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into any court and enjoin or restrain the party from committing such unlawful acts." 51 Cong. Rec. 16319 (1914).

[12] ". . . [T]he generic designation of the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held [in the Standard Oil Case, 221 U. S. 1,] that in view of the general language of the statute and

decades following the formulation of the Rule of Reason in 1911, this Court has made it perfectly clear that the prosecution of litigation in a state court may itself constitute a form of violation of the federal statute.

Thus, the attempt to enforce a patent obtained by fraud,[13] or a patent known to be invalid for other reasons,[14] may constitute an independent violation of the Sherman Act; and such litigation may be brought in a state court.[15] The prosecution of frivolous claims and objections before regulatory bodies, including state agencies, may violate the antitrust laws.[16] The enforcement of restrictive provisions in a license to use a patent or a trademark [17] may violate the Sherman Act; such enforcement may, of course, be sought in the state courts. Similarly, the provisions of a lease,[18] or a fair trade agreement,[19] may become the focus of enforcement litigation which has a purpose or effect of frustrating rights guaranteed

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the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181.

[13] *Walker, Inc.* v. *Food Machinery Corp.*, 382 U. S. 172.

[14] *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402.

[15] *Pratt* v. *Paris Gas Light & Coke Company*, 168 U. S. 255, 260.

[16] *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, aff'd after remand, 417 U. S. 901; *California Transport* v. *Trucking Unlimited*, 404 U. S. 508.

[17] *Timken Co.* v. *United States*, 341 U. S. 593; *Farbenfabriken Bayer A. G.* v. *Sterling Drug, Inc.*, 307 F. 2d 207 (CA2 1962); *Gray Line, Inc.* v. *Gray Line Sightseeing Companies Assoc., Inc.*, 246 F. Supp. 495 (ND Cal. 1965).

[18] *International Salt Co., Inc.* v. *United States*, 332 U. S. 392; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; *Phillips* v. *Crown Central Petroleum Corp.*, 376 F. Supp. 1250 (D Md. 1973).

[19] *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F. 2d 398 (CA2 1968), cert. denied, 393 U. S. 938; *Katz Drug Co.* v. *Shaefer Pen Co.*, 6 F. Supp. 212 (WD Mo. 1933).

by the antitrust laws, either in a state or federal court.[20] Indeed, the enforcement of a covenant not to compete—the classic example of a contract in restraint of trade—typically takes place in a state court.[21]

These examples are sufficient to demonstrate that "litigation in state courts may constitute an antitrust violation . . ." *ante*, at 10 n. 6. Since the judicial construction of a statute is as much a part of the law as the words written by the legislature, the illegal use of state court litigation as a method of monopolizing or restraining trade is as plainly a violation of the antitrust laws as if Congress had specifically described each of the foregoing cases as an independent violation. The language in § 16 of the Clayton Act which expressly authorizes injunctions against violations of the antitrust laws is therefore applicable to this species of violation as well as to other kinds of violations.

Since § 16 of the Clayton Act is an Act of Congress which expressly authorizes an injunction against a state court pro-

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[20] In litigation between a franchisee and a franchisor the former may challenge the validity of various contract provisions under federal law, while the latter may rely heavily on state contract law as a basis for controlling the franchisee's conduct. State proceedings to obtain possession of disputed premises or equipment are powerful weapons in such litigation, even when the federal court has the power to maintain the status quo. See *Chmielski* v. *City Products Corp.*, 71 F. R. D. 118, 141–142, 158 (WD Mo. 1976).

[21] The potential consequences of the plurality's view may perhaps best be illustrated by reference to a common law decision that could not possibly survive scrutiny under the Sherman Act. In *Nordenfeldt* v. *Maxim Nordenfeldt Guns and Ammunition Co.*, [1894] A. C. 535, the House of Lords held that a 25-year, worldwide covenant not to compete in the arms business was an enforceable bargain. One of the parties to such a contract was therefore entitled to enjoin a breach of the agreement by another party. If such common law relief should be granted by a state court in a comparable situation, and if the plurality's interpretation of the statute were accepted, a federal court would be powerless to interfere with state proceedings to enforce such a judgment.

ceeding which violates the antitrust laws, the plain language of the anti-injunction statute excepts this kind of injunction from its coverage.[22]

II

There is nothing in this Court's precedents which is even arguably inconsistent with this rather obvious reading of the statutory language.[23] On at least three occasions the Court has held that general grants of federal jurisdiction which make no mention of either state court proceedings, or of the

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[22] The text of the statute is quoted in n. 4, *supra*.

[23] Rather surprisingly the plurality seems to regard *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U. S. 511, as supporting its position. That case involved a construction of the portion of the Taft-Hartley Act that conferred jurisdiction on the NLRB to obtain injunctive relief in certain situations. The Court rejected the argument that the statute implicitly authorized similar relief for private parties:

"Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter may be referred.' § 10 (j), (l), 61 Stat. 149, 29 U. S. C. § 160 (j), (l). To hold that the Taft-Hartley Act also authorises a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify. To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act." *Id.*, at 517.

Since the statute did not expressly authorize the requested relief, it was obviously not within the "expressly authorized" exception to § 2283. The fact that the Court simply read the relevant statutes literally in that case supports my view that we should use the same approach here.

In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, on which the plurality also relies, the union did not even argue that injunctive relief was expressly authorized by federal statute. It unsuccessfully contended "that the federal injunction was proper either 'to protect or effectuate' the District Court's denial of an injunction in 1967, or as 'necessary in aid of' the District Court's jurisdiction." *Id.*, at 284. That case is wholly inapposite to the issue presented today.

The fact that these two cases provide the plurality with its strongest support emphasizes the dramatic character of its refusal to accept the plain meaning of the words Congress has written.

anti-injunction statute, are within the "expressly authorized" exception. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–601;[24] *Porter* v. *Dicken*, 328 U. S. 252[25] *Mitchum* v. *Foster*, 407 U. S. 225.

In *Mitchum* the Court made it clear that a statute may come within the "expressly authorized" exception to § 2283 even though it does not mention the anti-injunction statute or contain any reference to state court proceedings, provided that it creates a uniquely federal right or remedy that could

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[24] "But the power of the District Courts to issue an injunction to stay proceedings in a State court is questioned, since, by the Judiciary Act of 1793, 1 Stat. 335, it was declared that no writ of injunction shall be granted [by the United States courts] 'to stay proceedings in any court of a State.' But the act of 1851 was a subsequent statute, and by the 4th section of this act—after providing for proceedings to be had under it for the benefit of ship owners, and after declaring that it shall be deemed a sufficient compliance with its requirements on their part if they shall transfer their interest in ship and freight for the benefit of the claimants to a trustee to be appointed by the court—it is expressly declared, that 'from and after [such] transfer all claims and proceedings against the owners shall cease.' Surely this injunction applies as well to 'claims and proceedings' in State courts as to those in the federal courts . . . ." 109 U. S., at 599–600.

[25] The relevant portions of §§ 205 (a) and (c) of the Emergency Price Control Act of 1942 simply provided:

"Sec. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

. . . . . .

"(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act." 56 Stat. 33.

be frustrated if the federal court was not empowered to enjoin the state proceeding.[26] The Court then formulated and applied this test: "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U. S., at 238.

Section 16 of the Clayton Act created a federal remedy which can only be given its intended scope if it includes the power to stay state court proceedings in appropriate cases. As one of the sponsors of the statute explained, under "this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy." [27] But if the plurality's interpretation of the legislation were correct, a private litigant might indeed be "ruined in his business before he has his remedy" against state court litigation

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[26] "In the first place, it is evident that, in order to qualify under the 'expressly authorized' exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, 'no prescribed formula is required; an authorization need not expressly refer to § 2283.' *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516. Indeed, none of the previously recognized statutory exceptions contains any such reference. Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization. Thirdly, it is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U. S., at 237–238 (footnotes omitted).

[27] See n. 11, *supra*.

seeking enforcement of an invalid patent, a covenant not to compete, or an executory merger agreement, to take only a few obvious examples of antitrust violations that might be consummated by state court litigation.

The plurality assumes that Congress intended to distinguish between illegal state proceedings which are already pending and those which have not yet been filed at the time of a federal court's determination that a violation of the antitrust laws has been consummated; the federal court may enjoin the latter, but is powerless to restrain the former. See *ante*, at 11 n. 6. Nothing in the history of the anti-injunction statute suggests any such logic-chopping distinction.[28] Indeed, it is squarely at odds with Senator Sherman's own explanation of the intended scope of the statutory power ". . . to issue all remedial process or writs proper and necessary to enforce its provisions . . . ."[29] It would demean the legislative process to construe the eloquent rhetoric which accompanied the enactment of the antitrust laws as implicitly denying federal courts the power to restrain illegal state court litigation simply because it was filed before the federal case was concluded.[30] A faithful application of the rationale of *Mitchum* v. *Foster* requires a like result in this case.

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[28] Thus, the 1851 act to limit the liability of shipowners, 9 Stat. 635, applied equally to "preventing or arresting the prosecution of separate suits," see 109 U. S., at 596. The Interpleader Act of 1926, 28 U. S. C. § 2361, in terms, applies equally to the "instituting or prosecuting" of other litigation. In terms of the interest in federalism, since the injunction against litigation typically runs against the parties rather than the Court, there is little difference between denying a citizen access to the state forum and denying him the right to prosecute an existing case to its conclusion. In either situation, a federal injunction must rest on a determination that an important federal policy outweighs the interest in allowing a state court to resolve a particular controversy. But when the federal policy does justify that conclusion, the timing of the state court action should rarely be controlling.

[29] See n. 7, *supra*.

[30] It is true that when the Sherman Act was passed, Congress did not ex-

III

The plurality expresses the fear that if the Clayton Act is given its intended scope, the anti-injunction statute "would be completely eviscerated" since there are 26 other federal statutes which may also be within the "expressly authorized" exception. *Ante*, at 11–12, n. 7. That fear, stated in its strongest terms, is that in the 184 years since the anti-injunction statute was originally enacted, there are 26 occasions on which Congress has qualified its prohibition to some extent. There are at least three reasons why this argument should not cause panic.

First, the early history of the anti-injunction statute indicates that it was primarily intended to prevent the federal courts from exercising a sort of appellate review function in litigation in which the state and federal courts had equal competence. The statute imposed a limitation on the general equity powers of the federal courts which existed in 1793, and which have been exercised subsequently in diversity and other private litigation. But the anti-injunction statute has seldom, if ever, been construed to interfere with a federal court's power to implement federal policy pursuant to an express statutory grant of federal jurisdiction.[31] Although there is no need to resolve the question in this case, I must

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pressly address "the possibility that state court proceedings would be used to violate the Sherman or Clayton Acts." *Ante*, at 9. As the statute has been construed, however, it is now well settled that state courts can be used as the very instruments by which litigants, and the public, may be deprived of rights protected by the antitrust laws. When the state courts are so used and the antitrust laws thereby violated, the state litigation is as plainly a matter of federal legislative concern as if it had been expressly identified in the debates preceding the enactment of the 1890 statute.

[31] As already noted, *supra*, at 10 n. 23, there was no such express grant of jurisdiction to private litigants in either *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, *supra*, or *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, *supra*.

confess that I am not now persuaded that the concept of federalism is necessarily inconsistent with the view that the 1793 Act should be considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation.[32] If a fair reading of the jurisdictional grant in any such statute does authorize an injunction against state court litigation frustrating the federal policy, nothing in our prior cases would foreclose the conclusion that it is within the "expressly authorized" exception to § 2283.

Second, in any event, the question whether the Packers and Stockyards Act of 1921, for example, gives the federal court the power to enjoin state litigation has little, if any, relevance to the issues presented by this case. Whatever the answer to that question may be,[33] that 56-year-old statute will not exacerbate federal-state relations and jeopardize the vitality of "our federalism." Indeed, even if all the statutes identified by the plurality are within the "expressly authorized" exception to § 2283, it is extremely doubtful that they would generate as much, or as significant, litigation as either the Civil Rights Act or the antitrust laws.[34] The answer to the important question presented by this case should not depend on speculation about potential consequences for other statutes of relatively less importance to the economy and the Nation.

Third, concern about the Court's ability either to enlarge or to contain the exceptions from the anti-injunction statute,

[32] Indeed, Mr. Justice Black's opinion for the Court in *Porter* v. *Dicken*, 328 U. S. 252, seems to proceed on the assumption that the anti-injunction statute is inapplicable when the federal statute may be enforced in either a state or a federal court.

[33] Cases in which § 2283 has been held to bar injunctive relief against state proceedings have seldom involved attempts to enforce federal statutes. Indeed, some courts have held that any federal statute expressly authorizing equitable relief is within the exception from § 2283.

[34] It is worthy of note that only five of the cited statutes predate the addition of the words "except as expressly authorized by Congress" to the anti-injunction statute in 1948 (fully 16 were enacted in the last 10 years).

ante, at 10–14, is disingenuous at best. As originally enacted in 1793, the statute contained no express exception at all. Those few that were recognized in the ensuing century and a half were the product of judicial interpretation of the statute's prohibition in concrete situations. The codification of the judicial code in 1948 restated the exceptions in statutory language, but was not intended to modify the Court's power to accommodate the terms of the statute to overriding expressions of national policy embodied in statutes like the Klu Klux Act of 1870 or the Sherman Law of 1890.[25]

IV

Since the votes of THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are decisive, a separate comment on MR. JUSTICE BLACKMUN's opinion concurring in the result is required.

Their agreement with the proposition that an injunction properly entered pursuant to § 16 of the Clayton Act is within the "expressly authorized" exception to the anti-injunction statute establishes that proposition as the law for the future. His view that § 16 did not authorize the preliminary injunction entered by Judge McLaren is dispositive of this litigation but, for reasons which may be briefly summarized, is not a view that finds any support in the law.

Unlike the plurality which would draw a distinction between ongoing litigation and future litigation, *ante*, at 10 n. 6, MR. JUSTICE BLACKMUN differentiates between a violation committed by a multiplicity of lawsuits and a violation involving only one lawsuit. The very case on which he

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[25] The Reviser's Note to § 2283, which is taken from the House Report, H. R. Rep. No. 308, 80th Cong., 1st Sess., A181–A182 (1947), states that, with the exception of the addition of the words "to protect or effectuate its judgments," which were intended to overrule *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, "the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision."

relies rejects that distinction. In *California Motor Transport Co.* v. *Trucking Unlimited*, the Court stated:

> "Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 175–177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707; *Harman* v. *Valley National Bank*, 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F. 2d 851 (CA9 1965).
>
> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." 404 U. S. 508, at 512–513.

Each of the examples given in this excerpt from the *California Motor Transport* opinion involves a single use of the adjudicatory process to violate the antitrust laws. Manifestly, when Mr. Justice Douglas wrote for the Court in that case and described "a pattern of baseless, repetitive claims," *id.*, at 513, as an illustration of an antitrust violation, he did not thereby circumscribe the category to that one example. Nothing in his opinion even remotely implies that there would be any less reason to enjoin the "[u]se of a patent obtained by fraud to exclude a competitor from the market," *id.*, at 512, for example, than to enjoin the particular violation before the Court in that case.

In this case we are reviewing the affirmance by the Court of Appeals of an order granting a preliminary injunction. Affirmance was required unless the exercise of the District Court's discretion was clearly erroneous. And when both the District Court and the Court of Appeals are in agreement, the scope of review in this Court is even more narrow, *Faulkner* v. *Gibbs*, 338 U. S. 267, 268; *United States* v. *Dickinson*, 331 U. S. 745, 751; *Allen* v. *Trust Co.*, 326 U. S. 630, 636. Without the most careful review of the record, and the findings and conclusions of the District Court, it is most inappropriate for this Court to reverse on the basis of a contrary view of the facts of the particular case.

The mere fact that the Illinois courts concluded that petitioner's state law claim was meritorious does not disprove the existence of a serious federal antitrust violation. For if it did, invalid patents, price fixing agreements, and other illegal covenants in restraint of trade would be enforceable in state courts no matter how blatant the violation of federal law.

V

Apart from the anti-injunction statute, petitioner has argued that principles of equity, comity, and federalism create a bar to injunctive relief in this case. Petitioner's Brief 36–39. This argument is supported by three facts: The Illinois litigation was pending for a period of nine years; the Illinois Supreme Court concluded that respondents were guilty of a breach of fiduciary duty; and respondents withdrew their antitrust defense from the state action.

Unfortunately, in recent years long periods of delay have been a characteristic of litigation in the Illinois courts. That is not a reason for a federal court to show any special deference to state courts; quite the contrary, it merely emphasizes the seriousness of any decision by a federal court to abstain, on grounds of federalism, from the prompt decision of a federal question.

The Illinois Supreme Court's conclusion that respondents had violated a fiduciary obligation and that petitioner was entitled to a large damage recovery rested on that court's appraisal of the legality of a covenant in restraint of trade.[36] The fact that the covenant not to compete is valid as a matter of state law is irrelevant to the federal antitrust issue. If, for example, instead of a contract totally excluding respondents from the relevant market, the parties had agreed on a lesser restraint which merely required respondents to sell at prices fixed by petitioner, the Illinois court might also have concluded that respondents were bound by the contract even though the federal courts would have found it plainly violative of the Sherman Act. The Illinois decision on the merits merely highlights the fact that state and federal courts apply significantly different standards in evaluating contracts in restraint of trade.[37]

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[36] "In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend [machine] and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff." 58 Ill. 2d 289, 306–307, 321 N. E. 2d 1, 11 (1974).

[37] Indeed, a state court's conclusion that the breach of a covenant not to compete constitutes the violation of a fiduciary obligation as a matter of state law is not inconsistent with a federal court determination that the litigation enforcing that covenant was "conducted in bad faith" as that concept is used in cases like *Huffman* v. *Pursue*, 420 U. S. 592, 611. While the District Court did not specifically address the *Younger/Huffman* question, it had the following to say in addressing the extent of the Sherman Act violation:

"There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious, and litigation of this claim might well be interpreted—considering the record as a whole—as an attempt to further harass the Stoner interests and limit the amount of aid Stoner

That fact provides the explanation for respondents' decision to withdraw their federal antitrust defense from the Illinois litigation and to present it to the federal courts. Congress has granted the federal courts exclusive jurisdiction over the prosecution of private antitrust litigation.[38] Since the state courts do not have the power to award complete relief for an antitrust violation, since state judges are unfamiliar with the complexities of this area of the law, and since state procedures are sometimes unsatisfactory for cases of nationwide scope, no adverse inference should be drawn from a state court defendant's election to reserve his federal antitrust claim for decision by a federal court.

Indeed, since these respondents made that election, and since Congress has withheld jurisdiction of antitrust claims from the state courts, the plurality properly ignores the argument that principles of federalism require abstention in this case. For a ruling requiring the federal court to abstain from the decision of an antitrust issue that might have been raised in a state court proceeding would be tantamount to holding that the federal defense *must* be asserted in the state action. Such a holding could not be reconciled with the congressional decision to confer exclusive jurisdiction of the private enforcement of the antitrust laws on the federal courts. Quite plainly, therefore, this is not the kind of case in which abstention is even arguably proper.

When principles of federalism are invoked to defend a

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could lend Lektro-Vend. The attempt to enforce the covenants not to compete . . . appears to have been to lengthen the period for which the non-competition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive." 403 F. Supp., at 534–535. The Court of Appeals implicitly affirmed, *supra*, at 2. Thus while every state proceeding which clashes with the antitrust laws would not necessarily be motivated by a desire to harass or be conducted in bad faith, the findings indicate that such was the case here.

[38] See *Freeman* v. *Bee Mach. Co.*, 319 U. S. 448; *General Inv. Co.* v. *Lake Shore & Michigan S. Ry.*, 260 U. S. 261.

violantion of the Sherman Act, one is inevitably reminded of the fundamental issue that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great nation.

> "It was . . . to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
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> . . . . . .
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> "So by a stroke as bold as it proved successful, they founded a nation although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.
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> . . . . . .
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> "On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. To it may be credited largely the fact we are an independent and democratic country today." Rutledge, A Declaration of Legal Faith 25–27 (1947).

Only by ignoring this chapter in our history could we invoke principles of federalism to defeat enforcement of the "Magna Carta of free enterprise" [39] enacted pursuant to Congress' plenary power to regulate commerce among the States.

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[39] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the

I respectfully dissent.

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preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates*, 405 U. S. 596, 610. See also *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 235–236.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1792 and 75-1793

LEKTRO-VEND CORPORATION, a Delaware corporation; HARRY B. STONER; and STONER INVESTMENTS, INC., a Delaware corporation,

Plaintiffs-Appellees,

v.

THE VENDO COMPANY, a Missouri corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65 C 1755
RICHARD W. MCLAREN, *Judge.*

ARGUED DECEMBER 8, 1975 — DECIDED MAY 28, 1976

Before SWYGERT and SPRECHER, *Circuit Judges,* and WARREN, *District Judge.*[1]

SWYGERT, *Circuit Judge.* The overall question is whether the district court properly issued a preliminary injunc-

[1] The Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

tion in this antitrust case, thereby staying enforcement proceedings in the Illinois state courts to collect two judgments entered in a suit on an employment contract that contained a noncompetition covenant. Among the specific issues raised is whether section 16 of the Clayton Act, 15 U.S.C. § 26, comes within the "expressly authorized" exception of the anti-injunction statute, 28 U.S.C. § 2283. We hold that it does. We also hold that the district judge did not abuse his discretion in finding the plaintiffs have a likelihood of success on the merits and they would suffer irreparable injury absent an injunction. We therefore affirm the district court's grant of a preliminary injunction.

The Vendo Company is located in Kansas City, Missouri. In 1959 it was a leading manufacturer and seller of vending machines for cold beverages, ice cream, and certain other products. It did not manufacture vending machines for ~~ice cream,~~ candy, cigarettes, sandwiches, or coffee, but was conducting research and development in that area.

Stoner Manufacturing Company, located in Aurora, Illinois, was principally engaged in the manufacture of candy vending machines that had a nationwide market. Compared with Vendo it was a smaller and less diversified enterprise. Harry B. Stoner, his wife, and other members of his family owned all of the Stoner Manufacturing stock. Stoner was the president and controlled the company.

Following negotiations with Stoner, Vendo purchased the assets of Stoner Manufacturing Corporation in April 1959 with the exception of its real estate and buildings. (Upon consummation of the purchase, Stoner Manufacturing was reorganized as Stoner Investments, Inc.) The sales agreement imposed a ten-year noncompetition restriction on Stoner Manufacturing not to own, control, or manage any business engaged in the manufacture or sale

of vending machines. In addition, an employment contract between Vendo and Harry B. Stoner was executed whereby the latter would serve Vendo as a consultant for five years at an annual salary of $50,000. This contract had a noncompetition covenant also. Stoner agreed that during the term of the contract and for five years following the termination of his employment he would not "[D]irectly or indirectly, in any of the territories in which the Company [Vendo] . . . is at present conducting business and also in territories which Stoner knows the Company . . . intends to extend and carry on business . . ." enter into the vending manufacturing business. The employment contract provided that Stoner "[S]hould regulate his own hours of employment and shall determine the amount of time and effort he shall devote . . ." to Vendo.[2]

Almost immediately after the Stoner Manufacturing assets were acquired by Vendo, friction developed between

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[2] The full text of the noncompetition clause reads:

5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or saleman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter.

Stoner and his employer. Stoner complained that his services as a consultant were not being utilized and that he was being treated as a mere figurehead. Very likely this state of affairs prompted the development of the events that lead to the litigation in both the state and federal courts.

For several years before the sale to Vendo, Rod Phillips was the Stoner plant superintendent and his son, Bill, the assistant superintendent. Because of their disagreement with the policies and operations of Vendo, the father and the son resigned from their respective positions in mid-1960. Bill Phillips after quitting Vendo began the design of an electronic coin detecting device and attempted to interest Stoner in financing its development. Stoner evinced interest and agreed to pay the younger Phillips $650 per month to develop the device. It was agreed that any patents on the invention would belong to Stoner Investments. By the end of 1960 a model was completed and a patent applied for. The patent was issued in October 1960 and was assigned to Stoner Investments; however, the patented device was never produced commercially.

About this same time Rod and Bill Phillips developed a machine for vending candy that was radically different from any previous machine. It combined in a novel yet practical design three existing vending machine features: stock rotation (known as "first-in, first-out"), a window to display the product to be vended, and a capacity for stocking mixed items in a single conveyance.[3] At Rod

[3] In 1959 when Stoner Manufacturing sold out to Vendo it was manufacturing a candy vending machine called a "drop shelf" machine. The Phillip's machine, which became known as the "Lektro-Vend" model, was an extension of the "drop shelf" model. After the purchase of the Stoner assets in April 1959, Vendo began experimenting with the same idea as that developed by the Phillipses. Two models were built. Vendo, however, considered the models defective in certain mechanical respects and too expensive to produce. The project was dropped.

Phillips's request Stoner agreed to finance the development of this new machine; however, neither Stoner nor Stoner Investments was to have any ownership or control over the venture. Interest-free loans aggregating $200,000 were made by Stoner to the Phillipses during 1961-62. Stoner also made available a building in Aurora rent free.

By October 1962 prototypes of the machine developed by Rod and Bill Phillips had been constructed and were exhibited at a trade show in San Francisco. The machine won favorable interest in the industry. In the meantime Lektro-Vend Corporation had been organized. The original stockholders were Rod and Bill Phillips, Ruth Netray (Stoner's sister-in-law), and several employees of the corporation.

In December 1962 Mrs. Netray loaned the Phillipses $350,000. The loan was later increased to $525,000. The proceeds of those borrowings were used in part to pay off the $200,000 loan made by Stoner. During that same month Stoner asked Vendo to be released from his employment contract, saying that he had an opportunity to invest in the Lektro-Vend venture. Vendo refused to accede to his request and Stoner was told that Vendo itself was interested in buying the Lektro-Vend machine. Stoner was asked to learn whether Rod Phillips was interested in selling and, if so, to arrange a meeting between Phillips and representatives of Vendo. Stoner reported that Rod Phillips was asking $1,500,000.

Rod Phillips met with certain Vendo officials in January 1963 to show them the operation of the machine. Stoner was present, but took no part in the meeting. In March Stoner wrote Vendo's vice-president that he had told Phillips that he assumed in the absence of any word from Vendo that Vendo no longer had any interest in the patent. The vice-president responded that Vendo was still interested, but that the asking price was too high.

During the summer of 1963 Stoner had a conversation with Vendo's president. Upon inquiry from the latter as to the actual extent of Stoner's involvement with Phillips, Stoner said that his relationship was confined to loans which had been repaid by another person. He did not disclose that the other person was his sister-in-law.

In March 1964 Stoner Investments contracted to sell Lektro-Vend a new plant which had been built in Aurora by Stoner Investments during the previous year. The deal was financed through a bank loan which was subject to an agreement that Stoner Investments would repurchase the property in the event of default.

Stoner's contract of employment terminated June 1, 1964. During that same month Lektro-Vend issued 5,000 shares of stock to Mrs. Stoner and in July it issued 5,000 shares of stock to Stoner Investments. Stoner sent a letter to fifty vending machine operators in which he identified himself with the old Stoner Manufacturing Company and said that he was now interested in Lektro-Vend. He went to great lengths to recommend the Lektro-Vend product. Litigation soon followed.

Vendo sued Stoner and Stoner Investments in the Illinois state court in August 1965. In October 1965 Lektro-Vend, Stoner, and Stoner Investments sued Vendo in the federal court. The action in the state court was finally terminated in November 1974 when the Illinois Supreme Court denied a petition for rehearing of its decision affirming judgments against Stoner and Stoner Investments, Inc. in excess of $7,000,000.[4]

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[4] In an attempt to aid the reader to better understand this complex litigation and at the same time to shorten the opinion, a summary of the state court litigation follows.

Vendo v. *Harry B. Stoner and Stoner Investments, Inc.*

The suit was filed in Kane County, Illinois on August 10, 1965; the complaint charged breach of noncompetition covenants; an

The complaint in the federal action alleged violations by Vendo of sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). The case lay dormant until June 1975 when the district court granted plaintiffs' motion for a preliminary injunction staying defendant's efforts to collect its state court judgments until the merits of the federal suit could be determined. That action precipitated the present appeal under the provisions of 28 U.S.C. § 1292(a).

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[4] (Continued)
amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for $250,000 and against both defendants for $1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969, 105 Ill. App. 2d 261. The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court also held that though the trial court erred in striking the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled $7,363,500.

Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, 13 Ill. App. 3d 291, that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

Upon appeal to the Illinois Supreme Court on September 27, 1974, 58 Ill. 2d 289, the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery—the breach of a fiduciary obligation on the part of Stoner—than had been asserted by Vendo.

I

The threshold question relates to the authority of a federal court to enjoin a proceeding pending in a state court. Specifically, the question is whether section 2283 of the Judicial Code[5] prevented the district court from issuing a preliminary injunction staying the efforts of Vendo to collect its state court judgments against Stoner and Stoner Investments, Inc.[6]

The underlying purpose of this section, grounded in federalism is "[T]o prevent friction between state and federal courts." *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940). The statute is to be strictly applied *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 515-16 (1955). Unless one of the three exceptions listed in the statute is evident, it constitutes an absolute ban upon a federal court injunction against a pending state court proceeding. *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970).

In the instant case the district court held that both the "as expressly authorized" exception and the "in aid of its jurisdiction" exception applied and issued the preliminary injunction. Since we are of the view that the judge was correct in holding the first exception applicable, we need not reach the question raised as to the second exception.

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[5] 28 U.S.C. § 2283 provides:

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[6] The injunction preserved Vendo's lien and rights under the state court judgments. It also contained detailed provisions regulating the conduct of the judgment debtors during the pendency of the injunction.

Section 16 of the Clayton Act (15 U.S.C. § 26) provides that any person is entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage from violations of the antitrust laws. The complaint in the instant case alleges violations of sections 7 and 2 of the Sherman Act (15 U.S.C. §§ 7 and 2) and reads in part:

> On or about August 10, 1965, Vendo filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against Stoner and Stoner Investments. The full text of the complaint is attached to this complaint as Exhibit C. The complaint alleges that Stoner had breached his agreement not to compete of June 1, 1959 and that Stoner Investments had breached that portion of the April 3, 1959 contract of sale which sought to eliminate competition for 10 years throughout the world. As has been previously alleged, the world-wide non-competition covenants contained in the said contracts are illegal and in violation of the antitrust laws of the United States, particularly Sections 1 and 2 of the Sherman Act. The purpose of the said law suit is to unlawfully harass Stoner and Stoner Investments and to eliminate the competition of Stoner, Stoner Investments and Lektro-Vend. The lawsuit is part of Vendo's plan to monopolize the vending machine manufacturing business. The threats to enforce such non-competition covenants and the bringing of a suit in an attempt to enforce the illegal covenants are overt acts of Vendo in monopolization and constitute an attempt to monopolize the trade or commerce in the State of Illinois among the several states and foreign countries in the manufacture of such vending machines. Lektro-Vend, Stoner and Stoner Investments have been injured in their business and property as a direct and proximate result of these overt acts of Vendo.[7]

[7] Other allegations specifically refer to the noncompetition covenants contained in the 1959 agreements.

The question before us is whether section 16 of the Clayton Act, 15 U.S.C. § 26, should be interpreted as coming within the "expressly authorized" provision of section 2283 of the Judicial Code.

The Supreme Court's decision in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), provides guidance. In that case the Court held section 7 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, came within the meaning of the "expressly authorized" exception of the anti-injunction statute. The Court initially noted that, "Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, [it was] soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope." *Id.* at 233-34. The court also cataloged six separate instances in which it had found federal courts empowered to enjoin state court proceedings in carrying out the will of Congress "despite the anti-injunction statute." Mr. Justice Stewart observed that "[i]n addition to the exceptions to the anti-injunction statute found to be embodied in the various Acts of Congress, the Court [has] recognized other 'implied' exceptions to the blanket prohibition of the anti-injunction statute." *Id.* at 235. The relevant criteria to be applied in determining whether an Act of Congress comes within the "expressly authorized" exception were listed: (1) The "federal law need not contain an express reference" to the anti-injunction statute; (2) "[A] federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception"; and (3) "[A]n Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Id.* at 237. Summarizing these criteria, Mr. Justice Stewart wrote: "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of

equity, could be given its intended scope only by a stay of a state court proceeding." *Id.* at 238.

Applying these criteria to section 16 of the Clayton Act, we are of the view that it falls within the "expressly authorized" exception. *Mitchum* noted that section 1983 of the Civil Rights Act "opened the federal courts to private citizens, offering a uniquely federal remedy" in vindicating basic federal rights. *Id.* at 239. So, too, does section 16 of the Clayton Act open the federal courts to private citizens offering a uniquely federal remedy as an important part of the enforcement provisions of the antitrust laws. The private enforcement of these laws by injunctive relief is vested exclusively within the jurisdiction of the federal courts. This jurisdiction would be frustrated if federal courts did not have the power to enjoin a state court proceeding in an appropriate case. The present situation is a classic example. Here Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations.

Several cases support our holding. In *Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), decided prior to *Mitchum*, the plaintiffs had filed suit seeking to recover treble damages for violation of the Sherman and Clayton Acts. The loss or damages claimed in the federal suit were due to one plaintiff being forced into arbitration and other plaintiffs being evicted from leased premises—consequences which under the issues presented to the federal court were alleged to have resulted from antitrust violations. The court, in upholding the trial judge's determination to deny an injunction, stated that there was no authority under the federal antitrust laws to enjoin state enforcement or remedy for collection of ordinary debts. The court found that the plaintiffs had "only remotely allude[d] to their potential loss or damage under federal law." *Id* at 1071. There had

been "no attempt in either the arbitration or eviction proceedings to enforce the very conduct . . . prohibited by the Clayton or Sherman Acts." *Id.* The court found that the loss or damage done to the plaintiffs was related to their defenses as provided under *state* law. The loss did not flow from any prohibition under *federal* laws—there was no evidence that the evictions resulted from their refusal to buy according to a "tie-in" agreement they had executed with the defendants. While the court did not expressly decide that injunctive relief would have been proper had the loss or damage been intricately connected to a federal antitrust claim, it is clear from the logic of the decision that this result would have been reached.

Another decision prior to *Mitchum* reached exactly this result. In *United States* v. *Bayer*, 135 F. Supp. 65 (S.D.N.Y. 1955), the court held that a contract between Bayer and I. G. Farber violated the Sherman Act. As part of the afforded relief, the court enjoined an assignee of Faber from enforcing in state court royalty payments under the contract. In holding that section 2283 did not bar the injunction, the court said:

> The answer [to section 2283] is that § 4 of the Sherman Act grants the United States District Court jurisdiction "to prevent and restrain violations" of the Act. The injunction is a necessary incident to the Court's power in order to effectuate its judgment that the Bayer contracts are illegal. Simply to declare the agreement illegal and at the same time permit recovery of the proceeds would render the decree of the court quite sterile. The purpose of the decree is not only to prevent repetition of past offenses but also "to prevent the defendants from acquiring any of the fruits of the condemned project." 135 F. Supp. at 73.

Studebaker Corp. v. *Gittlin*, 360 F.2d 692 (2d Cir. 1966), is also instructive. In an appeal by a stockholder from an order of the district court enjoining the use of other stock-

holder authorizations obtained without compliance with the proxy rules in a state court proceeding to obtain inspection of Studebaker's shareholders' lists, the Second Circuit held that section 2283 did not bar the injunction. The court distinguished the federal securities statutes which afford enforcement by private parties from the provisions of the National Labor Relations Act which restrict the enforcement of its provisions to the National Labor Relations Board. Judge Friendly, writing for the court, stated: "Section 16 of the Clayton Act . . . affords a closer parallel, since there as here the private suit plays an important part in enforcement." 360 F.2d at 698. He concluded that "where the very act of prosecuting the state proceeding violated federal law . . .," section 2283 did not stand in the way of enjoining the state court action. *Id.*[8]

When Congress enacted the various antitrust laws it created federal rights and remedies enforceable by private parties in a federal court of equity. That such powers were vested exclusively in the federal courts reflect the Congressional belief that the national objectives of the antitrust laws will be effectuated if entrusted to the jurisdiction of the federal courts. If federal courts are prohibited from enjoining state court proceedings which are part of an anticompetitive scheme in violation of the federal antitrust laws, the full scope and force of those laws will be seriously impaired. Moreover, the national interest in the preservation of competition—one of our most important public policies—would be frustrated. Accordingly, we hold that section 16 of the Clayton Act constitutes an "expressly authorized" exception to the anti-injunction provision of the Judicial Code.

Vendo further contends that even if the district court was not barred by section 2283 from issuing the injunction,

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[8] *Gittlin* was cited in *Mitchum* (407 U.S. at 237, n. 25) in discussing the meaning of the "expressly authorized" exception.

principals of comity and federalism constitute a bar. The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court. We are in agreement with the trial court's observation:

> Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention. *Lektro-Vend Corp.* v. *Vendo Company*, 403 F. Supp. 527, 537 (N.D. Ill. 1975).

It is also argued that the district court lacked jurisdiction to reverse, review, or revise the state court judgments in a collateral attack. While the district court conceded that it had no power to directly review cases from state courts, it went on to point out that here the plaintiffs' claim that "[T]he state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of Sections 1 and 2 of the Sherman Act. . . ." *Id.* at 529. Therefore, the "[S]tate court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme." *Id.* at 532. The judge additionally commented: "The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anti-competitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available." *Id.* at 532, n. 4. We agree with these comments.

II

In determining that interlocutory relief was appropriate, the district court concluded that the plaintiffs had demonstrated a likelihood of ultimate success on the merits of their

claims. Defendant attacks this ruling by arguing that there was a total failure of proof. It says that the state court judgments are based on Stoner's violation of fiduciary duties and do not depend (contrary to the trial judge's findings) on the noncompetition covenants. Additionally, it is argued that the covenants are lawful when tested by antitrust standards.

In the first place, defendant's attack is overbroad. As we said in *Bath Industries* v. *Blot*, 427 F.2d 97, 111 (7th Cir. 1970), "[I]t is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient." Furthermore, since the grant of a temporary injunction rests within the sound discretion of the trial court, *Prendergast* v. *New York Telephone Co.*, 262 U.S. 43 (1923), appellate review is narrow. *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972).

Secondly, when the Supreme Court of Illinois affirmed the judgments on the unadvanced theory that Stoner had violated his fiduciary duties, it did not consider or decide any of the antitrust issues presented here. It did not and could not evaluate Vendo's alleged monopolistic scheme which included the enforcements of the noncompetition covenants. The district court found that the covenants were "overly broad" and that there was substantial evidence that Vendo had the "required specific intent to monopolize" in a relevant market. Given the limitations of our review, we cannot say the trial court erred.

The judge states in his memorandum opinion:

> On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital

> for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. (Citations omitted.)

We are not prepared to say that the court erred in reaching these conclusions.

Defendant's last contentions are that laches, waiver, and collateral estoppel bar injunctive relief. Issues not raised in the trial court cannot be presented for the first time on appeal. *United States* v. *Tyrrell*, 329 F.2d 341, 345 (7th Cir. 1964). As we noted in *Hamilton Die Cast, Inc.* v. *United States F. & G. Co.*, 508 F.2d 417, 420 (7th Cir. 1975): "[A] trial court should not be reversed on grounds that were never urged or argued below." Defendant failed to raise these issues in the trial court. Regardless of this procedural defect, we are convinced that these contentions are without merit.

The grant of interlocutory relief is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 28, 1976

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. ROBERT W. WARREN, District Judge*

LEKTRO-VEND CORP., etc., et al.,
Plaintiffs-Appellees,

No. 75-1792 & 75-1793 vs.

THE VENDO COMPANY, etc.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 65 C 1755

The Honorable Richard W. McLaren, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware corporation, **Plaintiffs,** **v.** **THE VENDO COMPANY, a Missouri corporation,** **Defendant.**	**No. 65 C 1755**

MEMORANDUM OPINION AND ORDER

(Filed May 30, 1975)

I.

This is a complex antitrust action[1] by Lektro-Vend Corporation, Harry B. Stoner and Stoner Investments, Inc.,

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[1] Plaintiffs also assert a civil rights claim pursuant to 42 U.S.C. § 1983 claiming certain portions of the Illinois Supreme Court decisions violated procedural and substantive due process. The Court has no jurisdiction to entertain this claim. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Louis Ender Inc.* v. *General Foods Corp.*, 467 F.2d 929 (8th Cir. 1972); *Sarelas* v. *Slechan*, 326 F.2d 490 (7th Cir. 1963). As explained in *Adkins* v. *Underwood*, 370 F. Supp. 510, 514-15 (N.D.Ill. 1974):

> "While lower federal courts were given certain power in the Judiciary Act of 1789, they were not given any power to directly review cases from state courts, and they have not been

(Footnote continued on following page.)

plaintiffs, against the Vendo Company, the defendant. Vendo recently obtained a $7,345,500 state court judgment against Mr. Stoner and Stoner Investments for violation of their purported fiduciary duties to Vendo. *Vendo* v. *Stoner*, 58 Ill.2d 289, N.E.2d (1974), *cert. denied*, U.S. (1975). Plaintiffs[2] now seek a preliminary injunction preventing Vendo from taking any further steps, pending a trial of this case, to collect its state court judgment, urging that the state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. For the reasons and on the conditions stated below, the motion will be granted. Insofar as required, this opinion shall constitute the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a), 65(d).

(Footnote continued from preceding page.)

given such power since that time. . . . Only the Supreme Court is authorized to review on direct appeal the decision of state courts. From the beginning this country has had two essentially separate legal systems. Each system, federal and state, proceeds independently of the other with ultimate review in the United States Supreme Court of federal questions raised in either system.

"Even if a state court decision is constitutionally wrong, that does not make the judgment void, it merely leaves it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than the United States Supreme Court can entertain a proceeding to reverse or modify a state court judgment which is in error."

[2] The motion for preliminary injunction only sought relief for Mr. Stoner and Stoner Investments, not Lektro-Vend Corporation. It is clear, however, that the hearing litigated the interests of all three plaintiffs and that Vendo acquiesced in this procedure. Plaintiff's motion to amend the motion to include Lektro-Vend is therefore granted.

To demonstrate the necessity of a preliminary injunction a brief excursion into the history of the relationship between the parties is required. This action has its genesis in the 1959 purchase of Stoner Manufacturing Corp. by Vendo. This sale was occasioned primarily by Mr. Stoner's health problems. At that time Stoner Manufacturing was primarily a producer of candy vending machines throughout the United States. Vendo prior to 1959 was a manufacturer of beverage and ice cream vending machines. The record in the state court proceedings and here demonstrates that Vendo had two purposes in purchasing Stoner Manufacturing: expansion of its product line[3] and elimination of Mr. Stoner as a potential competitor in the vending machine market. The parties agree that Mr. Stoner was a design genius in creating innovative vending machine products.

The sale agreement between Vendo and Stoner Manufacturing provided that Vendo would pay the Stoner interests $3,400,000 and deliver 60,000 shares of Vendo stock to Mr. Stoner. This made Mr. Stoner a major shareholder of Vendo. Mr. Stoner also became an officer and director of Vendo. His employment contract with Vendo had a five year term and his salary was $50,000 per year. The 1959 agreements also provided that Stoner Manufacturing would not directly or indirectly participate in the management, ownership or control of a vending machine business for ten years in the United States or any foreign country in which Vendo was doing business. Mr. Stoner's employment contract provided that for a period of five years following the termination of his employment, Mr. Stoner would not compete with Vendo in any territory in which Vendo was doing business or intended to do business.

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[3] Federal Trade Commission approval was required before Vendo could purchase the Stoner vending machine interests. Apparently this was accomplished by misrepresenting to the Commission that Stoner Manufacturing and Vendo were not actual or potential competitors. The record demonstrates that at the least Vendo was a potential competitor of Stoner Manufacturing.

Shortly after the 1959 agreements were consummated Mr. Stoner and Vendo had a falling out. Mr. Stoner had been led to believe he would be able to take an active role in research and development and would be treated as chairman of the board with respect to operation of the purchased assets of Stoner Manufacturing. In actuality Mr. Stoner was virtually ignored or bypassed by the Vendo management. The Vendo management admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services.

The succeeding events are adequately set out in the first opinion of the Illinois Court of Appeals at 105 Ill.App.2d 261, 269-77. During the fall of 1961 Mr. Stoner began financing vending machine research and development by certain former Stoner Manufacturing employees. This work culminated in the development of a revolutionary first-in-first-out (FIFO) candy vending machine, called the Lektro-Vend machine. The first prototypes of the Lektro-Vend were exhibited at a trade show in October 1962. Vendo employees were present and made initial inquiries about purchasing the design. The inventors, however, decided to manufacture and market the machine on their own. Mr. Stoner was asked to join these efforts. Thus in December 1962 Mr. Stoner sought to be released from his Vendo employment contract stating that he wanted to invest in the Lektro-Vend machine. Mr. Stoner did not disclose at that time his previous backing of the Lektro-Vend project.

Vendo refused the release request because it did not want to compete with Stoner. Vendo officials stated that part of the consideration for the 1959 agreements was the non-competition clauses. Instead, Stoner was requested to help Vendo purchase the Lektro-Vend from the inventors. The inventors sought $1,500,000; Vendo thought this price too high and declined to purchase the machine. Vendo also thought that there were inherent technical problems in the Lektro-Vend and that it was too costly to

produce. Mr. Stoner warned that was a serious mistake not to purchase the Lektro-Vend.

Some time shortly after the Vendo refusal to purchase the Lektro-Vend, Mr. Stoner revealed his financial support of the Lektro-Vend inventors. It appears, however, that Vendo was well aware of the Stoner involvement with Lektro-Vend as early as the 1962 trade show.

Mr. Stoner's and Stoner Investments' involvement with the Lektro-Vend inventors and the Lektro-Vend Corporation continued. Stoner Investments helped Lektro-Vend Corporation establish a production plant and further loans or loan guarantees were made by both Mr. Stoner and Stoner Investments. Meanwhile Mr. Stoner's employment contract with Vendo terminated on June 1, 1964, although Mr. Stoner remained on the Vendo board until the spring of 1965. It is clear, however, that neither Mr. Stoner nor Vendo thought until late in the state court litigation that this relationship created for Mr. Stoner any further obligations beyond those duties purportedly contained in the non-competition covenants.

In March 1965 Lektro-Vend salesmen reported that Vendo salesmen were circulating rumors in the trade that Lektro-Vend was about to go out of business. Mr. Stoner responded with a letter to 50 vending machine operators. This letter, denominated by the parties as the "Dear Operator" letter, stated that Stoner was now "interested" in Lektro-Vend Corporation and would guarantee its continued existence.

Conflict between the parties sharpened in August 1965 when Vendo brought suit against Mr. Stoner and Stoner Investments. The Court proposes to examine these proceedings only insofar as they may reflect illegal anti-competitive conduct by Vendo. The original Vendo complaint focused on alleged violation of the non-competition covenants in the employment and sales agreements and sought $500,000 in damages. This complaint was amended to add

a charge of theft of trade secrets and the ad damnum was raised to $1,500,000. An injunction against Stoner and Stoner Investments preventing further aid to Lektro-Vend running until July 1, 1969 was also sought. The Illinois Appellate Court opinion after the first trial reveals that the evidence during the first trial was directed to the covenants and the trade secrets issue. After the first trial, the Illinois trial court entered judgment against Mr. Stoner for $250,000 for violation of the covenants and $1,100,000 for theft of a trade secret. The Appellate Court at 105 Ill.App.2d 261 reversed as to the latter, stating that Vendo had no trade secret. It is clear from all the evidence that Vendo should have known that there was no theft of a trade secret; indeed, the first Illinois Court of Appeals' decision demonstrates that the effort by Vendo to prove theft of a trade secret amounted to vexatious litigation.

The Appellate Court remanded the case with directions for further hearings on damages. Before the second state trial, Vendo again raised the ad damnum, this time to $7,345,500. At trial, however, Vendo attempted to prove the entirely new theory that Stoner was legally at fault for Vendo's failure to have a FIFO machine. On this basis, the trial court entered judgment against Stoner for $170,835 for forfeiture of salary for the time in which he purportedly illegally competed, and for $7,345,500 against Stoner and Stoner Investments for the lost profits for failure of Vendo to have a FIFO machine. Mr. Stoner and Stoner Investments again appealed and the Appellate Court again reversed, stating that Vendo's failure to have a FIFO vending machine was not attributable to the Stoner interests. The salary forfeiture was affirmed. Each side was then granted leave to appeal to the Illinois Supreme Court.

The Illinois Supreme Court reinstated the trial court judgment, predicating liability on a corporate opportunity theory. It held that as a director of Vendo Mr. Stoner breached his fiduciary duty by failing to adequately disclose his financial involvement in the Lektro-Vend machine.

The court thus concluded that it could not say that Vendo would have declined to purchase the Lektro-Vend machine had adequate disclosure been made or a genuine opportunity to purchase existed. It affirmed the $7,345,500 damage award on the Vendo lost profits theory. The Stoner interests sought a rehearing on the grounds that the corporate opportunity theory denied it substantive and procedural due process because Stoner was functionally denied a trial on this issue. The Illinois Supreme Court denied the petition for rehearing and a petition for certiorari was subsequently denied by the United States Supreme Court. As noted above, the Court believes that it does not have jurisdiction to review the due process aspects of the state court proceedings; however, as will be more fully explained below, the state court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme.[4]

II.

Three legal issues are raised by the brief outline of facts just concluded: (1) Have plaintiffs established under the four usual requirements that a preliminary injunction is necessary? (2) Have plaintiffs met their special burden of establishing the necessity for enjoining a state court proceeding? (3) Assuming an injunction is necessary, what type of bond is appropriate?

A.

The four factors usually examined to determine whether interlocutory relief is appropriate are:

(1) likelihood of ultimately prevailing on the merits;

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[4] The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anticompetitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available.

(2) likelihood of irreparable harm;

(3) balancing the hardships; and

(4) protection of the public interest.

In the instant case, this Court believes that plaintiffs have demonstrated likelihood of ultimate success on both the section 1 and section 2 Sherman Act claims. The section 1 claim arises from the 1959 agreement. Under section 1 of the Sherman Act, contracts which unreasonably restrain interstate commerce are void. The federal antitrust laws make covenants not to compete which are overly broad in geographical scope or in time unreasonable restraints of trade. Once antitrust jurisdiction is invoked, the validity of the challenged covenants is measured solely under federal law, regardless of legality under state law. *Schine Chain Theatres* v. *United States*, 334 U.S. 119 (1948).

Under federal law a non-competition covenant is legal under two conditions:

(1) the covenant is merely ancillary to the main purpose of a lawful contract;

(2) the covenant is necessary to protect the legitimate property interests purchased by the covenantee. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211. Moreover, a covenant not to compete examined in light of other monopolistic practices can be declared illegal even if otherwise lawful if it can be shown that the object and the effect of the agreement was primarily directed at the elimination of competition. *Schine Chain Theatres* v. *United States, supra; Bowl America, Inc.* v. *Fair Lane, Inc.*, 299 F.Supp. 1080 (D.Md. 1969).

Here it appears that the covenants extracted were overly broad, and the facts and circumstances surrounding the 1959 agreement and subsequent activities demonstrate that their object (and effect) were primarily directed at the

elimination of competition rather than protection of good will. As drafted, the covenants were intended to protect the good will of Vendo where Vendo was doing or planning to do business; they were not limited to areas in which Stoner Manufacturing was operating. Under *Addyston Pipe* and similar cases this amounts to prima facie proof of illegality. Additionally, Vendo's president admitted the major purpose and intent of the employment contract was to obtain the anticompetitive benefits accruing from the covenants. It should also be noted even after Vendo received notice that Stoner was involved in the Lektro-Vend project it refused to terminate his employment as the contract allowed. It appears to the Court that this course of conduct was adopted by Vendo in an attempt to limit Mr. Stoner's activities for the full planned term of the post-employment agreement, showing that protection of good will was not a significant goal in obtaining the covenant. Since Mr. Stoner apparently was never called upon to perform significant services for Vendo the covenant amounted to a naked agreement not to compete, solely anticompetitive in purpose and effect.

Vendo argues that even if the covenants are illegal under section 1 of the Sherman Act, the state court judgment did not rely on these contractual terms and therefore is unassailable. The section 1 claim does not rest alone on the theory that the state litigation was an essential part of an illegal anticompetitive scheme but rather depends on an analysis of the total circumstances surrounding creation of the 1959 agreements. The Court believes that viewed in this light the corporate opportunity theory relied on in the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants. Mr. Stoner's position as a director was dependent on the acquisition and employment contracts. He would not have become a corporate director of Vendo absent entry of the anticompetitive agreements. Additionally, his status as a director clearly was not intended to create additional

duties; it only encompassed duties already undertaken as an employee of Vendo. The general rule that where a contract is only partially illegal under the antitrust laws, the illegal portions can be severed, is therefore inapposite. Here the anticompetitive clauses are essential primary elements of the bargain and thus cannot be severed, making all elements of the 1959 agreements unenforceable. See *Superior Bedding* v. *Serta Assoc., Inc.*, 353 F.Supp. 1143 (N.D.Ill. 1972). See also *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F.R.D. 347 (D.N.J. 1948), *aff'd* 96 F.2d 90 (3d Cir. 1949). Vendo's reliance on the ultimate theory of the state court litigation thus is not well taken. The 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart.

Plaintiffs also argue that a violation of the "attempt to monopolize" proscription of section 2 of the Sherman Act occurred here. To prove violation of section 2, plaintiffs must establish three elements of proof: (1) a dangerous probability of actual monopolization in a relevant market; (2) specific intent to establish a monopoly power; and (3) overt acts. Plaintiffs need not prove that Vendo has succeeded in establishing monopoly power but must merely show that Vendo has the capacity to make a serious attempt to acquire monopoly status. *Lorain Journal* v. *United States*, 342 U.S. 143 (1951); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971).

In the instant case the relevant market is a recognized sub-market within the vending machine industry—coin operated food and beverage vending machines. Lektro-Vend and Vendo are actual competitors in the sub-market, although the price structure of the industry prevents absolute congruity of competition. The geographic market is nationwide in scope. Within this market the number of competitors has been steadily declining. Between 1958 and 1966 the number of vending machine manufacturers was nearly halved and the number of competitors with sales over $100,000, particularly in the candy bar section of the industry, became quite small. Within this increasingly con-

centrated market, Vendo maintained a significant market share. While it appears that the evidence is somewhat in conflict, Vendo's market share is most probably over 20%. The "attempt to monopolize" prohibition in section 2 was intended to "nip incipient monopolies in the bud"; with this congressional policy in mind, considering the structure of the vending machine industry, the Court believes that, unchecked, Vendo's alleged practices raise a dangerous propensity for creation of an actual monopoly.

The Court also finds that plaintiffs have produced substantial evidence that Vendo had the required specific intent to monopolize and that it performed overt acts intended to create a monopoly position. Prior to 1959, Vendo had an aggressive acquisition program to buttress its product line and market share. The courts have consistently held that such conduct, along with other evidence of anticompetitive conduct, is persuasive evidence of an attempt to monopolize. See *e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). Vendo's uniform policy of extracting broad covenants not to compete—such as the ones involved in the instant litigation—also evidences specific intent to monopolize. In addition, there is evidence that Vendo used litigation as a method of harassing and eliminating competition.

The right to litigate commercial controversies comes within the penumbra of the first amendment. *Cf. Eastern R.R. Pres. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). However, if litigation is used as an integral part of a scheme attempting to monopolize and exclude competition from the marketplace, that litigation can lose its first amendment protection. *Walker Process Equip.* v. *Food Mach. Corp.*, 382 U.S. 172 (1965). As the Supreme Court stated in *California Motor Transport:*

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as

> an integral part of conduct which violates a valid statute . . . . If the end result is unlawful, it matters not what the means used in violation may be lawful." 404 U.S. at 5145

This holding was recently reaffirmed in *United States* v. *Otter Tail Power Co.*, 410 U.S. 366 (1973); *aff'd after remand*, 417 U.S. 901 (1974). Thus if plaintiffs can prove that Vendo's state court litigation against the Stoner interests was not a genuine attempt to use the adjudicative process legitimately, antitrust liability in the instant case under section 2 of the Sherman Act would follow. *Cf. Metro Cable Co.* v. *CATV of Rockford*, 74-1492 (7th Cir. April 2, 1975). See also *Mach-Tronics Inc.* v. *Zirpoli*, 316 F.2d 820 (9th Cir. 1963) (antitrust liability arises from anticompetitive institution of state trade secret case); *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952).

There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious and litigation of this claim might well be interpreted—considering the record as a whole—as an attempt to further harass the Stoner interests and limit the amount of aid Stoner could lend Lektro-Vend. The attempt to enforce the covenants not to compete by way of injunction and damages may be similarly indication of a violation of section 2. It may also be argued that, had this litigation been legitimately undertaken to protect good will or confidential information, Vendo would have exercised its right to terminate Mr. Stoner's employment as soon as it discovered Mr. Stoner's relationship with the Lektro-Vend project; instead it prolonged Mr. Stoner's employment for the full term even though he was given no duties. As noted above, the intent of this action appears to have been to lengthen the period for which the non-competition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive. If so, this

scheme was successful, for the state litigation severely hampered Lektro-Vend's development.

Despite the above stated line of reasoning, defendant contends that the Supreme Court's decisions in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947) and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) bar injunctive relief under the instant circumstances. These cases hold that the antitrust laws provide no defense for actions under state law for collection of debts for sale of goods and services:

> "If the contract provisions sued on in the state court do not embody or further the anti-competitive practices, then there has been no irreparable loss or damage from *violation of the antitrust law*" requiring injunctive relief.

Response of Carolina v. *Leasco Response, Inc.*, 408 F.2d 314, 319 (5th Cir. 1974).

However, when the precise conduct proscribed by the antitrust laws is sought to be furthered in a state court action, the antitrust defense and injunctive relief are available in federal court. *Continental Wallpaper Co.* v. *Lewis Voigt & Sons*, 212 U.S. 227 (1909). See also *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962). *Bruce's Juices* and *Kelly* therefore do not apply. If the state court litigation was itself part of the anti-competitive scheme, a judgment arising from such litigation is not an ordinary debt.

On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition

of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. *Cf. Mar Foods* v. *First Nat'l Bank of Chicago*, 73 C 1959 (N.D.Ill. November 6, 1974). Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. *Milsen* v. *Southland*, 454 F.2d 363 (7th Cir. 1972).

In the Court's view, the public interest also requires issuance of a preliminary injunction. Few public policies are more important than protection of competition. In the instant case, as previously mentioned, the number of competitors in the vending machine market is declining. Thus the courts have a duty to vigilantly protect the remaining competition. The balance of equities also favors plaintiffs. Vendo's state judgment is protected by judgment liens and security agreements. Stoner and Stoner Investments, despite Vendo's protestations to the contrary, have substantially complied with these agreements. Vendo has already realized over $582,000 from an escrow trust agreement. If it is ultimately successful here, its only loss will be certain interest payments which the Stoner interests concededly cannot pay. On the other hand, the Stoner interests and Lektro-Vend's losses arising from denial of the preliminary injunction will be severe, as demonstrated above. See *Semmes Motors, Inc.* v. *Ford*, 429 F.2d 1197 (2d Cir. 1970).

B.

Because they seek an injunction against state court proceedings, plaintiffs are faced with a special burden. The anti-injunction statute, 28 U.S.C. § 2283, prohibits issuance of an injunction to stay proceedings, in a state court except

under three conditions: (1) when expressly authorized by an act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate federal judgments. Moreover, the principles of comity and federalism militate against unnecessarily interfering with pending state court actions even if § 2283 is satisfied. *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

There is a paucity of authority on the issue of whether the injunction provisions contained in 15 U.S.C. § 26 provide express congressional authorization to grant injunctions against state court actions. *United States* v. *Bayer*, 135 F. Supp. 65 (S.D.N.Y. 1955) indicates that express authorization is provided while *Helfenbein* v. *International Ind., Inc.*, 498 F.2d 1068 (8th Cir. 1971) states no such authority exists. The Supreme Court's decision in *Mitchum* v. *Foster, supra*, seems to clarify the issue. In *Mitchum*, a 42 U.S.C. § 1983 case, the Court held that to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to § 2283 nor expressly authorize an injunction of a state court proceeding. To qualify as an expressly authorized exception the statute would, however, have to create

> "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." 407 U.S. at 237.

These tests are equally applicable to antitrust actions. When Congress passed the various antitrust laws it clearly created federal rights and remedies enforceable in a federal equity court. In fact, such power was exclusively vested in the federal court system, indicating congressional approval of enjoining certain state actions, if necessary. *Cf. Lemelson* v. *Ampex*, 372 F. Supp. 708 (N.D. Ill. 1974). This Court therefore holds that these laws, in the instant case, can only be given their intended scope by staying the state court proceedings and that § 2283 authorizes an injunction here

where the state court proceedings are part of the anti-competitive scheme.

The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court. Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention.[4]

C.

Since the Court has determined that a preliminary injunction should issue, the terms and conditions of the injunction must be determined. The first issue is what type of security must plaintiffs produce pursuant to F.R.Civ.P. 65(c). The amount of security required is within the sound discretion of the court and is intended to protect against such cost and damages as may be incurred by any party wrongfully restrained or enjoined. However, there is no liability for damages resulting from issuance of an injunction erroneously granted unless the suit was prosecuted maliciously and without probable cause. See 7 *Moore's Federal Practice* ¶ 65.10 at p. 98 and cases cited therein.

[4] The findings contained herein are interlocutory in nature necessarily based on an incomplete record. Of course, a complete trial specifically directed to the issues in this case might produce evidence requiring a different or more limited result.

Because the plaintiffs have placed considerable evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo, it seems unlikely that Vendo will be able to prove any compensable damage arising from issuance of this injunction. Moreover, since this injunction will not remove the pre-existing judgment liens, Vendo remains well protected. Accordingly, a nominal bond of $2,500.00 (Twenty Five Hundred Dollars) will be required. See *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Urbain* v. *Knapp Bros. Mfg.*, 217 F.2d 810 (6th Cir. 1954).

The remaining issue concerns the scope of the preliminary injunction. Such an injunction should protect plaintiffs from harm due to collection of the state court judgment while preserving the Stoner interests' assets so that Vendo will be able to collect on the judgment if it is ultimately successful. The Court believes that these two goals can be accomplished by enjoining further collection efforts but leaving intact those portions of the state decrees (and liens) which prevent transfer of any of the Stoner assets. As previously indicated, Mr. Stoner and Stoner Investments will be required to pay all taxes, utilities and maintenance from currently collected income to preserve the assets. Plaintiffs shall prepare and present on notice a draft order in conformance with the views expressed herein within ten (10) days.

IT IS SO ORDERED

ENTERED:

/s/ R. W. McLAREN
United States District Judge

DATED: May 29, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware corporation, Plaintiffs, v. THE VENDO COMPANY, a Missouri corporation, Defendant.	No. 65 C 1755

ORDER GRANTING PRELIMINARY INJUNCTION

[Entered June 27, 1975]

This Cause Coming on for Hearing on plaintiffs' motion for a preliminary injunction and the Court having considered the pleadings, the record, the evidence and argument and the post-trial briefs submitted by the parties, and the Court having made its findings of fact and conclusions of law, as more particularly appear in its Memorandum Opinion and Order dated May 29, 1975; and

It Appearing to the Court:

1. That the plaintiffs have demonstrated likelihood of ultimately prevailing on the merits of their claims under Section 1 and Section 2 of the Sherman Act, as alleged in Count I of the Amended and Supplemental Complaint;

2. That the balance of equities favors plaintiffs in that the harm to defendant from the issuance of the preliminary

injunction will be slight, whereas denial thereof would result in severe loss to plaintiffs;

3. That plaintiffs will suffer irreparable harm if a preliminary injunction is not granted in that the continued action of the defendant in collecting its state court judgments, hereinafter enjoined: (a) will prevent LEKTRO-VEND from marketing a promising, newly-developed vending machine, and put insurmountable barriers in the way of its raising capital necessary to the prosecution of its business; (b) will effectively place STONER INVESTMENTS, INC. and LEKTRO-VEND CORP. under the control of defendant, which would require dismissal of the action under Article III of the Constitution of the United States as to said plaintiffs; and (c) will severely limit the ability of the individual plaintiff effectively to prosecute this action;

4. That the public interest in protection of competition requires the issuance of a preliminary injunction; that the paramount national interest requires court intervention by a preliminary injunction herein; that the failure to issue such injunction will deprive the Court of full and effective jurisdiction of the said federal antitrust claims set forth in Count I of the Amended and Supplemental Complaint and will impair, obstruct, or render fruitless the Court's determination of said claims; and that a preliminary injunction as provided herein is necessary to protect the jurisdiction of this Court; and

The Court being sufficient advised in the premises, IT IS ORDERED:

1. That the liens of those certain judgments in the amounts of $170,835 and $7,345,000, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Co.* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, and the two Bonds and the Security Agreement In Connection With Appeal Bonds, which Bonds and Agreement were dated and were

approved December 14, 1971, by the Honorable John S. Peterson, Circuit Judge, and which were entered into in connection with said judgments, remain in full force and effect. A copy of said Security Agreement is attached hereto and marked Exhibit A, and the parties thereto shall abide by the terms thereof, except that where said Security Agreement requires or permits application to the Court, such application shall hereafter be made to this Court. In order to preserve said assets subject to said judgment liens while this injunction is in force, HARRY B. STONER and STONER INVESTMENTS, INC. shall pay all taxes on, and bills for utilities and maintenance of said assets, including insurance presently covering said assets, from currently collected income.

2. That the enforcement of those certain supplementary Proceedings to Discover Assets Citations which defendant, THE VENDO COMPANY, has caused to be issued in connection with said state court judgments, namely:

Respondent	Date Issued
Chicago Title & Trust Co.	December 20, 1974
Stoner Investment, Inc.	January 3, 1975
Valley National Bank	January 3, 1975
Dreyer, Foote & Streit Assoc.	January 21, 1975
Harry B. Stoner	January , 1975
Clifford Zabka	January 21, 1975

be and they are hereby stayed, provided, however, that VENDO may apply to the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, from time to time, for periodic extensions of said Citations, in order to prevent the automatic termination thereof, as provided by Illinois Supreme Court Rule 277(f), and plaintiffs may not object to such applications. All assets of STONER and STONER INVESTMENTS, INC. attached as the result of said Citations are released to the extent that STONER and STONER INVESTMENTS, INC. may collect all rent, interest, dividends, salaries, bank deposits, or other amounts due and owing

to them from the entities and persons named in said Citations.

3. Nothing in said Security Agreement shall preclude STONER INVESTMENTS, INC., in the ordinary course of business, from:

(a) collecting rents, interest, dividends and other income deriving from its assets for use as funds for payment of taxes, maintenance, insurance, and utilities so as to conserve and protect its assets;

(b) opening, maintaining, and using checking and savings accounts in any federally or state chartered bank in Illinois (STONER INVESTMENTS shall give notice to defendant of the establishment of any new account).

(c) paying all trade and other creditors' obligations incurred in the ordinary course of business;

(d) paying to its employees, excepting HARRY B. STONER, their ordinary salaries and wages;

(e) agreeing with any bank to completely cancel or subordinate any accounts receivable, notes or obligations which were in existence prior to January 14, 1975, including interest thereon, owing to STONER INVESTMENTS, INC. by LEKTRO-VEND CORP., to any loans to LEKTRO-VEND CORP. by such bank or other lender.

4. Plaintiffs shall be authorized to pay their reasonable attorneys fees for services and expenses in this case, but plaintiffs may not make payments therefor prior to the rendering of such services or the incurring of such expenses, and this Court's approval shall be required before any such fees or expenses are paid.

5. This order shall not be construed to prevent defendant or its agents or attorneys from participating in any pending contempt proceedings in Kane County, Illinois Circuit Court, provided that such participation is required by that Court and that the Kane County Court determines to proceed *sua sponte* with that action.

6. Until otherwise ordered by this Court, the defendant, THE VENDO COMPANY, its agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined from taking any further steps to enforce or collect, or attempt to enforce or collect, or commence or prosecute any related or supplementary actions or proceedings with regard to those certain judgments in the amount of $170,835 and $7,345,500, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Company* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

7. Plaintiffs shall not dissipate any assets which may be subject to the above-described judgments and they shall make no expenditures or investments out of the ordinary course without Court approval.

IT IS, THEREFORE, FURTHER ORDERED that upon filing by plaintiffs of an undertaking in the sum of Twenty-Five Hundred Dollars ($2,500.00), in the form of a surety bond, or bond secured by the deposit of that sum in cash with the Clerk of this Court, for the payment of such costs and damages as may be incurred or suffered by defendant if it is found to have been wrongfully enjoined, there issue out of this Court, under the seal thereof, a Writ of Preliminary Injunction, restricting said defendant, its agents, servants, employees and attorneys and all persons in active concert or participation with them, from doing any of the facts prohibited herein, unless otherwise ordered by this Court.

ENTERED:

R. W. McLAREN
United States District Judge

DATED: June 27, 1975

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 27, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HOWARD T. MARKEY, Chief Judge*
Hon. HARLINGTON WOOD, JR., Circuit Judge

LEKTRO-VEND CORPORATION, a Delaware corporation, et al., Plaintiffs-Appellants	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-2120 vs.	No. 65-C-1755
THE VENDO COMPANY, a Missouri corporation, Defendant-Appellee.	The Honorable Stanley J. Roszkowski, Judge

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*Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

Opposition

No. 81-1007

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LEKTRO-VEND CORP., a Delaware corporation,
ANN STONER, as Administrator of the Estate of
Harry B. Stoner, Deceased, and
STONER INVESTMENTS, INC., a Delaware corporation,

Petitioners,

v.

THE VENDO COMPANY, a Missouri corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EARL E. POLLOCK
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
Counsel of Record for Respondent

Of Counsel:
GARY SCHNEIDER
PAUL S. FIESTER
SONNENSCHEIN CARLIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

LAMBERT M. OCHSENSCHLAGER
WAYNE F. WEILER
ENID, OCHSENSCHLAGER, MURPHY & HUPP
75 South Stolp Avenue
Aurora, Illinois 60504
(312) 892-8771

QUESTION PRESENTED

Each of the questions tendered in the petition (p. i) is based on false factual premises having no application to this case and contrary to the extensive findings made by the courts below on a voluminous record—findings which petitioners do not even challenge here as "clearly erroneous".

Thus, there was no "merger between substantial competitors" as petitioners assert; instead, the courts below found that the two companies produced basically different types of vending machines and that Vendo's purpose in making the acquisition (which was approved by the Federal Trade Commission) was to expand its line of machines. Similarly, contrary to petitioners' assertions, the courts below found that the non-competition covenants were ancillary in nature, necessary to protect the covenantee's legitimate property interests, enforced "only as to clearly reasonable time, space, and product limitations" (Pet. App. 22), and had not been shown to have an adverse effect on competition in any market.

Given the findings below and the record on which they are based, the only question presented is whether this Court should review that record *de novo*, weigh the evidence, and reassess the findings even though they are not challenged here as "clearly erroneous".

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THE VENDO COMPANY, a Missouri corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Like its statement of the questions presented, petitioners' statement of the case is highly argumentative and misleading. Petitioners' statement ignores—and substantially contradicts—the extensive findings below and advances essentially the same view of the evidence rejected by the lower courts.

The opinion of the Court of Appeals contains a detailed exposition of the factual background (Pet. App. 1-11). The following is a summary of the prior proceedings in the case and the decisions below:

Prior Proceedings

This is a federal antitrust action arising out of a state court proceeding in which the defendant in this action, The Vendo Company ("Vendo")[1], recovered final judgments affirmed by the Illinois Supreme Court against Harry B. Stoner ("Stoner") and Stoner Investments, Inc. ("Stoner Investments"), two of the plaintiffs who brought this federal action.

Vendo is engaged in the business of manufacturing and marketing certain types of vending machines. In 1959, for approximately five million dollars, Harry Stoner sold the assets of his company, Stoner Manufacturing Corporation, to Vendo, and he became an officer and director of Vendo pursuant to an employment agreement executed as part of the sale. Stoner Investments (the successor to Stoner Manufacturing) is a real estate and investment company which, *inter alia*, owns approximately 80% of the stock of plaintiff Lektro-Vend Corporation. (Pet. App. 2.)

In the state action, filed by Vendo in August 1965, the Illinois Supreme Court (in a unanimous opinion by Mr. Justice Schaefer) held that Stoner, during the 1959-64 period when he was both an officer and director of Vendo, had repeatedly and flagrantly violated his fiduciary duties to Vendo (a) by secretly supporting Lektro-Vend's development and marketing of a new type of candy vending machine, (b) by withholding the facts concerning his involve-

[1] Vendo does not have a parent company or any subsidiaries which are not wholly owned. Vendo's affiliates are First National Bank of Kansas City, a wholly owned subsidiary of First National Charter Corporation, Elmer F. Pierson, J. T. Pierson, and J. T. Pierson, Jr.

ment with Lektro-Vend and misleading Vendo with regard to its possible acquisition of the Lektro-Vend machine, and (c) by misappropriating Vendo's opportunity to acquire the machine. The Illinois Supreme Court accordingly affirmed the judgments (in the amount of $7,516,335) in Vendo's favor. *Vendo Co.* v. *Stoner*, 58 Ill. 2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

In October 1965, two months after Vendo filed its state court action, the complaint in this case was filed in the court below. In their complaint, plaintiffs (petitioners here) charged that Vendo's state court action and Stoner's non-competition covenants contained in the 1959 sale and employment agreements violated §§ 1 and 2 of the Sherman Act.

In January 1975, when Vendo attempted to collect its state court judgments after their affirmance by the Illinois Supreme Court, the plaintiffs activated this federal action (which had then been pending for 9½ years) and filed a motion for preliminary injunction to enjoin collection of the judgments, on the ground that such an injunction was necessary to enable them to obtain a trial on the merits in the federal case. Although granting the preliminary injunction to maintain the status quo until a trial on the merits could be held, the District Court did not find an antitrust violation or decide any other issue on the merits of the case. In addition, the District Court expressly recognized that its decision was "interlocutory in nature necessarily based on an incomplete record".[2] (Pet. App. 253 n.5.) The Seventh Circuit affirmed the preliminary injunction (Pet. App. 221-36), but this Court reversed on the ground that the injunction violated 28 U.S.C. § 2283 and was therefore beyond the jurisdiction of the District Court (Pet. App. 175-220).

[2] Only 89 exhibits were offered in evidence, and only four live witnesses—one on behalf of Vendo—testified (Pet. App. 16).

The trial on the merits was held in June 1978 and lasted 23 days. The stenographic transcript consists of 2,246 pages. The live testimony of 11 witnesses was presented, including Robert Wagstaff, former Vendo chief executive officer, who was Vendo's principal negotiator in the acquisition discussions with Stoner (and who had not been present at the preliminary injunction hearing). (Pet. App. 4, 14, 16, 60.)

On July 22, 1980, after careful consideration of all the evidence, the District Court rejected each of plaintiffs' antitrust claims on the basis of its detailed findings of fact. The District Court concluded that "Consequently, the state court judgments stand" (Pet. App. 166).

The Court of Appeals, in a lengthy opinion analyzing each of petitioners' contentions, sustained the District Court's findings and conclusions and affirmed the District Court's judgment (Pet. App. 1-41). Petitioners seek review of that decision.

The District Court Decision

With respect to the legality of the 1959 covenants under Section 1 of the Sherman Act, the District Court concluded that, contrary to plaintiffs' contention, the acquisition and covenants were sought for legitimate reasons and not to eliminate Stoner's competition. It also determined, in accordance with Stoner's own pre-merger affidavit to the FTC, that Stoner decided to sell because of his failing health and other management problems which had hurt his company (Pet. App. 60-61). The District Court also found that plaintiffs had not established that the covenants adversely affected the market or competition so as to render them unreasonable and violative of the antitrust laws (Pet. App. 132-34).

With respect to plaintiffs' attempt-to-monopolize claim under Section 2, the District Court found that plaintiffs had not shown that there was a dangerous probability that Vendo could achieve a monopoly (Pet. App. 136-43). In this regard, the court completely rejected the testimony of plaintiffs' expert, Morton Kamien.[3] In addition to emphasizing plaintiffs' failure to offer probative evidence of Vendo's alleged market power, the court concluded that the evidence in the record concerning ease of entry contradicted the conclusions of plaintiffs' expert (Pet. App. 143).

The court also held (Pet. App. 144-45):

> "In this case, the acts claimed by plaintiffs were not predatory and are nowhere near sufficient to create such a danger of monopoly, not only because of Vendo's declining market position, but more significantly because the acts relied upon—Vendo's acquisitions, its alleged policy concerning non-competition covenants, and the state court suit against Stoner and Stoner Investments—have not been directed toward or caused any injury to other companies in the vending machine industry."[4]

The District Court further found that Vendo did not have a specific intent to monopolize. It found that neither the 1959 covenants nor the state court proceeding were overt acts in furtherance of a monopoly (Pet. App. 147-48).

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[3] The Court stated:

> "Mr. Kamien did not know the market shares of other vending machine manufacturers and admitted having made no effort to determine them. Indeed, he testified that he made no empirical studies of the industry and did not contact any operators, location owners, trade associations, trade journals or other vending machine manufacturers." (Pet. App. 168 n.7.)

[4] The court noted that plaintiffs did not even contend that Vendo had ever sought to injure companies such as National Vendors, Automatic Products, and RMI, which had captured large market shares while Vendo's market position deteriorated (Pet. App. 145).

It also determined that the record was devoid of "evidence that any [Vendo] acquisition was anticompetitive in intent or effect" (Pet. App. 146). Finally, it held that "no specific intent to monopolize can be inferred from Vendo's alleged policy of requiring and enforcing covenants not to compete" (Pet. App. 147) and that "There was, in short, no proof of 'predatory conduct directed to accomplishing the unlawful purpose' of achieving monopoly power. . . ." (Pet. App. 148).

The Court rejected plaintiffs' Section 7 argument because of the inadequacy of plaintiffs' proof concerning the acquisition's impact on competition in the market (Pet. App. 149-51). The Court concluded that "rather than 'substantially lessening competition' the merger in the instant case, if it affected the relevant line of commerce at all, affected it in such a way as to promote competition" (Pet. App. 149).

The Court of Appeals Decision

The Court of Appeals, after considering "each of appellants' claims in some detail" (Pet. App. 13), affirmed the judgment of the District Court.

In response to petitioners' attack on the trial judge's findings of fact, the Court ruled: "Having critically reviewed the record within the bounds of the clearly erroneous standard of review, we conclude that the district court's findings of fact relevant to the issues on appeal are not clearly erroneous." (Pet. App. 15, citation omitted.) Additionally, the Court of Appeals rejected plaintiffs' heavy reliance on the preliminary injunction decision, stating that the "contrast in the amount of evidence considered by the district judge in each instance graphically demonstrates the reason underlying the rule that preliminary injunction determinations do not bind a court in the subsequent trial on the merits" (Pet. App. 16).

With respect to petitioners' Section 1 claim, the Court held that it "could not upset the district court's finding that the covenants not to compete were . . . ancillary to a lawful main transaction . . ." (Pet. App. 20).[8] The Court sustained the District Court's finding that the covenants "were clearly necessary to protect Vendo's interests in the acquired business and employment of Stoner." (Pet. App. 23, 128).

The Court found it unnecessary to reach petitioners' claim of facial overbreadth (which it nonetheless said it would find questionable (Pet. App. 21)) on the ground that a § 1 violation requires "proof that the defendant knowingly enforced the arguably overbroad section . . ." and that furthermore the breach "occurred within a reasonable geographic area and time period" and "with respect to a product reasonably related to the legitimate purpose of the restraint" (Pet. App. 22). The Court agreed that "Vendo sought to enforce the covenants . . . only as to clearly reasonable time, space, and product limitations" (Pet. App. 22).

The Court held that petitioners had failed to meet the requirement under the Rule of Reason of showing "an adverse impact in the relevant market." (Pet. App. 23-27). It wholly rejected petitioners' claim that such impact "flows automatically from the restraint itself", holding that this position was "tantamount to urging a *per se* rule for analyzing non-competition covenants under § 1" (Pet. App. 23).

With respect to petitioners' Section 2 claims, the Court of Appeals agreed with the trial court that petitioners

[8] The Court was unpersuaded that these findings were clearly erroneous, stating that "Much of the plaintiffs' purported evidence of unlawful intent consists of isolated excerpts from the testimony of Vendo officers" (Pet. App. 20).

"failed to establish even one of the three required elements" of an attempt to monopolize (Pet. App. 28).

The Court rejected petitioners' argument that its statistical evidence was sufficient to find a dangerous probability of monopolization (Pet. App. 30). The Court also agreed with the District Court that Vendo's prior acquisitions and procurement and enforcement of covenants were "insufficient proof of the existence of an overall plan to monopolize capable of transforming these otherwise legitimate business activities into predatory acts" (Pet. App. 32). Finally, the Court upheld the District Court's conclusion that Vendo had no specific intent to monopolize, particularly in light of petitioners' failure to establish any predatory acts or a dangerous probability of Vendo's obtaining a monopoly (Pet. App. 32-35).

With respect to petitioners' § 2 claim based on the state court litigation, the Court held that the plaintiff failed to establish any such violation. In addition, the Court noted that it had no power to review the merits of the state case. (Pet. App. 35.)

With regard to petitioners' Section 7 claim, the Court of Appeals—like the District Court—found it unnecessary to determine whether Vendo and Stoner Manufacturing were "true competitors" since in either event there was no violation (Pet. App. 35-36). The Court rejected petitioners' argument based exclusively on market share statistics for a period a decade prior to trial. Relying on this Court's opinion in *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 497 (1974), the Seventh Circuit held that it could not properly "ignore other evidence tending to show that the market shares do not accurately reflect the likelihood that the merger will substantially affect competition adversely." (Pet. App. 37-38.) In that connection, the Court

held that the District Court did not err in rejecting the § 7 claim in light of "the undisputed evidence" (including Harry Stoner's pre-merger affidavit submitted to the FTC) that "Stoner Manufacturing's market position [prior to the acquisition] was anything but healthy" and "had been steadily deteriorating" and that Vendo had lost substantial market share following the acquisition and was totally eliminated from the candy vending machine market by 1972. (Pet. App. 39-41.)

REASONS FOR DENYING THE WRIT

The petition is in essence a brief on the merits of factual issues decided adversely to petitioners below. Each of the questions tendered by the petition rests on premises wholly at odds with the extensive findings made by the lower courts and the voluminous evidence presented at a month-long trial on the merits. What petitioners really seek from this Court is a *de novo* factual review of the entire record, including a *de novo* determination of the proper inferences to be drawn from testimony and other evidence. Yet, remarkably, petitioners do not even suggest that any of the findings are "clearly erroneous" (Rule 52(a), F.R.Civ. P.).

The case as portrayed by petitioners bears no resemblance to the case tried and adjudicated below. In effect, although not attacking any of the findings as "clearly erroneous", petitioners ask this Court to accept their view of the evidence which they unsuccessfully advanced in both courts below and which both courts below emphatically rejected.

As both courts below recognized, the case turns on its particular facts. The petition does not present any contested legal issues of any general significance, and the decision below does not conflict with any decision by this Court or

any other Court of Appeals. This is patently not a case where review by this Court is either necessary or appropriate.

I. Petitioners' Section 7 Contention Rests On A Hypothetical And Unfounded Factual Premise, And The Decision Below Does Not Conflict With Any Decision Of This Court Or Any Other Court of Appeals.

Petitioners' entire Section 7 argument is predicated on their repeatedly stated premise that the 1959 acquisition was a "merger between substantial competitors" (Pet. i, 9, 10, 11) and a "merger of leading competitors" (Pet. 14). However, neither the trial court nor the Seventh Circuit made such a determination and, in fact, the two companies were not competitors prior to the acquisition and no actual competition was eliminated. The District Court found that the two companies produced basically different types of vending machines, that Vendo was not then manufacturing a candy machine, and that Vendo's purpose in making the acquisition was to expand Vendo's product line and in particular to add Stoner's candy machine to Vendo's line of other types of machines (Pet. App. 47-48, 61-62). Moreover, by 1972 (6 years before trial), Vendo had been eliminated from the candy machine business and the industry had fundamentally changed (Pet. App. 50-52, 137-38).

In addition, the District Court rejected as "incredible" petitioners' contention that Vendo's purpose in making the acquisition was to eliminate Stoner's competition (Pet. App. 127). The District Court also found that "rather than 'substantially lessening competition' the merger in the instant case, if it affected the relevant line of commerce at all, affected it in such a way as to promote competition" (Pet. App. 149).

The 1959 acquisition, moreover, was approved by the Federal Trade Commission, in large part on the basis of Stoner's affidavit representing to the Commission that the acquisition was essential to maintain his company as a viable entity.

Although petitioners' complaint does not even allege a Section 7 violation, petitioners contend (p. 10) that "the decision below effects a wholly unwarranted expansion of the rule laid down in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974)." However, the decision of the Seventh Circuit is fully in accord with *General Dynamics* and the other decisions cited in the petition. As already pointed out, the real thrust of petitioners' argument is that this Court (contrary to settled principles governing its review function) should reconsider the trial evidence and the findings made below. Furthermore, what is unusual here is not the Seventh Circuit's unexceptional application of the merger decisions of this Court, but petitioners' belated attack on the Stoner acquisition—an acquisition which Stoner sought and actively supported before the Federal Trade Commission in 1959, and for which Stoner was paid $5,000,000 by Vendo.[6]

In now attempting to establish that the Stoner acquisition violated Section 7, petitioners have relied entirely upon outdated statistics with regard to market shares and industry concentration. However, as this Court held in *Brown*

[6] Although the Seventh Circuit did not reach the issue, respondent pointed out below that Stoner's solicitation of and complete involvement in the acquisition should preclude petitioners' standing to challenge the transaction. See, e.g., *Thi-Hawaii, Inc.* v. *First Commerce Financial Corp.*, 627 F.2d 991 (9th Cir. 1980); *Premier Electrical Construction Co.* v. *Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970).

Shoe Co. v. *United States*, 370 U.S. 294 (1962), ". . . Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry" (pp. 321-22), and ". . . only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger" (p. 322 n.38).

On that basis, in *General Dynamics*, this Court held:

> ". . . the District Court was justified in viewing the statistics relied on by the Government as insufficient to sustain its case. *Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete* . . . . Thus, companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7, not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor. (415 U.S. at 501, italics added.)
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> "Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the District Court and fully substantiated that court's conclusion that its acquisition by Material Service would not 'substantially . . . lessen competition . . . .'" (415 U.S. at 503-04.)

Despite the Government's proof in that case that the merger produced a firm with a substantial market share in a concentrated market with a trend toward increasing concentration, the Court concluded (p. 511):

> "Irrespective of the markets within which the acquiring and the acquired company might be viewed as competitors for purposes of this Section 7 suit, the Government's statistical presentation simply did not establish that a substantial lessening of competition was likely to occur in any market."

See also *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975); *Kaiser Aluminum & Chemical Corp.* v. *Federal Trade Commission*, 652 F.2d 1324 (7th Cir. 1981); *United States* v. *International Harvester Co.*, 564 F.2d 769 (7th Cir. 1977); *United States* v. *Tidewater Marine Service, Inc.*, 284 F.Supp. 324, 343 (E.D. La. 1968); *United States* v. *M.P.M., Inc.*, 397 F.Supp. 78, 90-1 (D. Colo. 1975); *United States* v. *Consolidated Foods Corp.*, 455 F.Supp. 108 (E.D. Pa. 1978); *United States* v. *First National State Bancorporation*, 1980-2 Trade Cases ¶ 63,445 (D.N.J.).

Based on the same rationale, the Seventh Circuit in the instant case sustained the trial court's conclusion that petitioners had failed to establish their Section 7 claim, irrespective of (and without any need to decide) whether the acquisition should be deemed to be horizontal or a product extension. Even assuming *arguendo*, on a hypothetical premise, that the acquisition could be deemed horizontal, the Court emphasized (1) that Stoner Manufacturing's market position had been steadily deteriorating in the years immediately preceding the acquisition and (2) that Vendo's post-acquisition market shares and profits had dramatically declined, even as the performance of some of its competitors improved. (Pet. App. 40-41.) Thus, taking into account significant post-acquisition evidence which was not susceptible to manipulation by Vendo, both courts found that petitioners' outdated market statistics were inadequate to show any likelihood of a future lessening of competition (Pet. App. 36-41, 149-59). Contrary to petitioners' argument, there was no unwarranted expansion of the *General Dynamics* decision, but instead merely a rejection of petitioners' insufficient proof. Accordingly, there is no occasion for this Court to grant review.

II. Petitioners' Contention Concerning The Non-Competition Covenants Rests On Factual Arguments Rejected By The Courts Below, And There Is No Conflict With Any Decisions Of This Court Or Any Other Court Of Appeals.

The questions tendered by petitioners concerning the non-competition covenants are likewise based on false premises and amount to little more than a contention that the courts below should have reached different *factual* conclusions. The Court of Appeals sustained the District Court's findings that the covenants *were* ancillary in nature (Pet. App. 20), *were* "clearly necessary to protect Vendo's interests in the acquired business and employment of Stoner" (Pet. App. 23), *were* enforced "only as to clearly reasonable time, space, and product limitations" (Pet. App. 22), and had *not* been shown to have an illicit purpose or an anticompetitive market effect (Pet. App. 19-20, 24-27).

Petitioners' arguments concerning the covenants fallaciously ignore these findings and are advanced as if the courts below failed to consider the established standards which petitioners seek to have this Court apply *de novo*.

On the other hand, to the extent that petitioners argue that all ancillary restraints incident to a sale or employment contract are *per se* illegal notwithstanding their compliance with those standards and the Rule of Reason, such an argument is completely rebutted by this Court's decisions in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979).

The decision below is entirely correct and does not conflict with any decision of this Court or any other Court of Appeals.

III. Petitioners' "Full Faith and Credit" Contention Is Based On A Distortion Of The Decision Below.

Petitioners' "Full Faith and Credit" argument is also based on a wholly false premise. Contrary to petitioners' assertion, the Court of Appeals did *not* refuse to consider evidence relating to "petitioners' claim that Vendo's manner of prosecuting its Illinois action evidenced its anti-competitive intent" (Pet. 26). On the contrary, the Court of Appeals held (Pet. App. 35):

> "We agree with the plaintiffs that where state court litigation has resulted in the enforcement of contracts violative of the antitrust laws, a state court judgment cannot preclude a federal court from subsequently addressing the merits of the antitrust claims. This is precisely why the plaintiffs received a trial in the federal court on their antitrust allegations. In the case at bar, however, no antitrust violation has been proved."

The Court of Appeals relied on the "Full Faith and Credit" constitutional clause and implementing statute *solely* for the unassailable proposition that "We, of course, are powerless to review the *merits* of that determination" by the Illinois Supreme Court (Pet. App. 35, italics added). In short, the Court of Appeals (like the District Court) considered *all* of petitioners' evidence on the federal antitrust issues (and concluded that "no antitrust violation has been proved" (*ibid.*)), but correctly distinguished that function from the wholly impermissible one of reviewing "the merits" of state-law issues decided by the state courts.

CONCLUSION

No legal issue warranting review is presented, and petitioners do not even assert that the extensive findings below are clearly erroneous. The petition should be denied.

Respectfully submitted,

EARL E. POLLOCK
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
Counsel of Record
for Respondent

Of Counsel:
GARY SENNER
PAUL S. FISHER
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

LAMBERT M. OCHSENSCHLAGER
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY
& HUPP
75 South Stolp Avenue
Aurora, Illinois 60504
(312) 892-8771

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